

BIRNS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY
DOCKET NOS. C-2996-75
C-1110-78

17 or 18th Sept @ C.C.C.
Betty

STATE OF NEW JERSEY, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff,:

v.

VENTRON CORPORATION, a Massachusetts
corporation; WOOD RIDGE CHEMICAL
CORPORATION, a Nevada corporation;
ROBERT M. WOLF & RITA W. WOLF, his
wife; UNITED STATES LIFE INSURANCE
COMPANY, a New York corporation &
F. W. BERK & CO., INC.,

Defendants

MOBIL OIL CORP., et al.

Plaintiff,

v.

STATE OF NEW JERSEY, DEPARTMENT OF
ENVIRONMENTAL PROTECTION, et al.

Defendants.

DECIDED: August 27, 1979

Mr. John Degnan, Attorney General of New Jersey for plaintiff
(Mr. Ronald Heksch, Deputy Attorney General of counsel and
on the Brief).

Mr. Steven A. Tasher, for the State of New Jersey, plaintiff.

Mr. Harry R. Hill, Jr., for defendants.
(Messrs. Backes & Backes)

Mr. William F. Tuohey, for defendants.
(Messrs. Milton, Keane & Brady)

FILED
AUG 27 1979
BLAKE D. LESTER
L.L.C.

pg 23 } Insert
pg 42, 44 }
pg 63 } order
Policy 17 What to do @ Ventron
2) By whom?
3) effort on other
cases of OHSC program
4) Political - (Chem Control)
Lamarck Bill
5) D. we found
appeal?



Mr. John F. Neary, for defendants.
(Messrs. Connell, Foley & Geiser)

Mr. Murry D. Brochin, for defendants.
(Messrs. Lowenstein, Sandler, Brochin, Kohl & Fisher)

Mr. John J. Francis, Jr., and Mr. Richard A. Levao, for defendants.
(Messrs. Shanley & Fisher)

Mr. Robert Wilentz, for plaintiff Intervenor.
(Messrs. Wilentz, Goldman & Spitzer)

Ms. Margaret Dee Hellring, for defendants.
(Messrs. Hellring, Linderman, Goldstein & Siegel)

LESTER, J. S. C.

INTRODUCTORY STATEMENT

These complicated consolidated environmental cases require a delicate balancing of private and public interests. To what extent may private persons conduct themselves in a manner which adversely affects the public welfare before those persons may be held to answer to the public for such actions? How far may the Government go in imposing strict liability upon enterprises or industries that pollute or have the tendency to pollute? May the State direct polluters to abate a situation (nuisance) created over the years when during many of those years neither polluters nor State had reason to know of the vast cumulative effect of the pollution problem? What is the State's duty to protect the public?

The technical arguments and procedures which have accompanied the 55 day trial have left the court with over 500 pages of briefs and proposed findings, many thousands of pages

of transcripts, over 40 volumes of depositions and 5 cartons of physical exhibits. Several months have been spent in reviewing this mountain of legalese. This opinion, thus, is an effort to preserve the rights of all parties without losing sight of the goal of the Legislature and the obligation of this Court -- that is -- the protection of the public.

I. NATURE OF THE STATE'S CASE

The State of New Jersey, Department of Environmental Protection (hereinafter State or DEP) brought this action against Ventron Corporation (hereinafter Ventron), Wood Ridge Chemical Corporation (hereinafter WRCC), F. W. Berk and Company (hereinafter Berk), Robert M. Wolf and Rita W. Wolf (hereinafter Wolf), and the United States Life Insurance Company (hereinafter U.S. Life). Rovic Construction Company (Rovic) intervened in the action. (1)

The State alleges that the defendants violated N.J.S.A. 58:10-23-1, et seq. New Jersey Water Quality Improvement Act of 1971 (hereinafter 1971 Act); N.J.S.A. 23:5-28 (as of 1971 part of New Jersey Water Quality Act) (hereinafter 1937 Act), and created or maintained a public nuisance under both statutory and common law.

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1. Rovic Construction Company was Wolf's general contractor for the development project and for the demolition. In 1974 Wolf was the principal but not the sole shareholder. However, he later became the sole shareholder. All claims asserted by the State against Wolf are deemed to have been asserted against Rovic. All crossclaims against Wolf are similarly deemed to have been asserted against Rovic. Rovic asserted a counterclaim against the State and a crossclaim against Ventron.

The State seeks injunctive relief requiring defendants to abate the conditions resulting from the emanation of mercury from the subject properties located in the Boroughs of Wood-Ridge and Carlstadt, New Jersey and to prevent further pollution of the waterways. It seeks to hold all defendants jointly and severally liable for the statutory penalties provided in the various acts and for any damages it might prove on its nuisance claim.

The State claims that defendants' actions constituted a public nuisance by virtue of their violations of the various statutes and that their conduct also constitutes a nuisance at common law.

Judgment has heretofore been granted in favor of defendant, U. S. Life. The Court held that mere ownership, without more, would not be a proper basis for the imposition of liability upon U. S. Life under the circumstances of this case. In the absence of any conduct whatsoever by U. S. Life which might have contributed to the flow of mercury into Berrys Creek, and in the absence of any knowledge of the existence of mercury contamination, U. S. Life was simply an owner under a sale and leaseback agreement who could not be burdened with remedying a situation resulting entirely from the conduct of others. (See, State v. Exxon, 151 N.J. Super 464 (Ch.Div.1977)). U.S. Life was merely a financier, lending money under the legal fiction of sale and leaseback, instead of utilizing the usual mortgage approach. The Legislature did not intend to impose liability upon such an innocent entity under the anti-pollution statutes under scrutiny here. Thus, U. S. Life's motion for judgment was granted at the close of Plaintiff's case.

II. BACKGROUND OF THE CASE

The history of this case must be traced back to 1929 when defendant Berk commenced its operation of a mercury processing facility upon a portion of the subject premises. At that time all of the property involved in this suit was leased to Berk from Carlstadt Development and Trading Company, a Maryland corporation. From 1943 until 1960 Berk owned the property and operated its plant thereon. In 1960 Berk sold its assets to Velsicol, which formed WRCC, a wholly-owned subsidiary, to own and operate the chemical plant. In 1967 WRCC declared, to its parent and sole shareholder, a land dividend of approximately thirty-three acres (hereinafter Velsicol Tract). Velsicol retains title to this tract to date. WRCC retained title to the 7.1 acres upon which the operating plant was located (hereinafter Wolf Tract).

In 1968 all of the capital stock of WRCC was purchased from Velsicol by Ventron. WRCC, than a 100% owned subsidiary of Ventron, continued to operate the processing plant and continued as record owner of the 7.1 acres.

In 1974 WRCC/Ventron sold the operating assets to Troy Chemical Corporation and conveyed the 7.1 acres to Wolf, a broker and real estate developer in the area. Sale of the business to Troy Chemical Corporation was effective January 1, 1974. Title was conveyed to Wolf on May 21, 1974 by deed dated May 7, 1974, pursuant to the February 5, 1974 option agreement which had been exercised on April 19, 1974. All organic and inorganic mercury operations were terminated by April 16, 1974.

Wolf planned to demolish the existing structures and to build five warehousing and distribution facilities on the site. Demolition was a prerequisite to the development or sale of the properties.

On May 7 or 8, 1974, but prior to conveyance, the Department of Labor conducted a site inspection from which it concluded that some hazardous chemicals remained in the building and that prior to commencement of demolition all hazardous chemicals and residues had to be removed to prevent unsafe working conditions. Bona fide attempts were made by Wolf and Rovic to remove the residual chemicals. Wolf and Rovic felt that they had abided by the directive and demolition commenced on May 22, 1974.

On or about June 7, 1974 the DEP and the United States Environmental Protection Agency (hereinafter EPA) advised Wolf that the demolition process could cause the discharge of chemicals into Berrys Creek, a tributary of the Hackensack River. By telegram dated June 16, 1974 Wolf was ordered to suspend demolition. The problem no longer was chemical dust on the walls but mercury ground pollution.

On June 21, 1974 Wolf and Ventron representatives were informed by representatives of the EPA and DEP that soil contamination at the Wood-Ridge site was the probable source of the pollution in Berrys Creek and in a portion of the Meadowlands. Wolf was ordered to analyze and determine the extent of mercury in the soil and to institute a containment program. Wolf retained the services of firms with expertise in soil analysis to ascertain the extent of the pollution and to devise an abatement or containment program which would satisfy the DEP and EPA directives as

they then existed. There is no question as to the good faith efforts of Wolf and Rovic to cooperate with these regulatory agencies.

In August 1974 representatives of Wolf, Rovic, the DEP and the EPA agreed that construction could proceed on the westerly portion of the site on the condition that Wolf remove to the easterly portion the upper layer of contaminated soil. This was done and the first building erected. However, the situation as to the easterly portion was more complicated. The cost of removal of the hundreds of thousands of cubic yards of contaminated soil from the easterly portion would be prohibitive. Indeed, another obstacle was the disposal of this contaminated soil.

The DEP and the EPA then agreed to a plan involving entombment of the polluted soil whereby the soil would be contained under the building still to be erected. The containment system was installed.⁽²⁾ The effectiveness of the system has been challenged by the State. The State has failed to demonstrate that the system is not working. The evidence indicates that the Wolf containment system and the natural land barrier between the Wolf location and Berrys Creek guard against pollutants within the Wolf containment system further polluting the waterways of this State.

After the conveyance, Wolf had subdivided the tract into lots 10A and 10B. In December 1975, long after demolition had been completed, Wolf conveyed lot 10A to U. S. Life under a standard

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2. The entombment system was only part of the overall plan proffered by the State. The portions of that plan which sought future monitoring of the site at Wolf's expense and a deed restriction were rejected by Wolf.

sale and leaseback arrangement. Title to 10B remains in Wolf to date.

The State must prevail on its claims against Berk, WRCC, Velsicol and Ventron. Liability arises under the 1937 Act as originally enacted and amended; under the 1971 Act; and under theories of public nuisance. The State may not prevail against defendants Wolf and Rovic.

III. NATURE OF COUNTERCLAIMS

Defendants⁽³⁾ counterclaim against the DEP based upon N.J.S.A. 58:10-23.11 (g); Liabilities for clean up and removal costs and direct and indirect damages, which provides in pertinent part:

- a. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained.

N.J.S.A. 58:10-23.11 (f) provides:

Whenever any hazardous substance is discharged, the department shall act to remove or arrange for the removal of such discharge, unless it determines such removal will be done properly and expeditiously by the owner or operator of the major facility or any other source from which the discharge occurs. (Emphasis added).

It is the position of all defendants that the Spill Fund was created to secure an immediate source of funding so that the State could act rapidly to clean up any pollution as soon as it became apparent that the polluters would not or could not clean

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3. Rovic asserted a counterclaim against the State for damages under these provisions of the Act. Whatever directives were given to Rovic, Wolf and Rovic together undertook to prevent further discharge by installing the containment system.

up the environment. Defendants argue that this portion of the Act applies to any spill, regardless of the time of its occurrence because of the public policy considerations set forth in the Act itself, N.J.S.A. 58:10-23.11 (a). The Legislature there declared:

"The Legislature finds and declares that the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State. The Legislature intends by the passage of this Statute... to provide liability for damages sustained within this State as a result of any discharge of said substances, by requiring prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort business and other persons damaged by such discharge." (Emphasis added).

Defendants do not see this as a retroactive application of the Act. Even if it were, defendants argue that the Act expresses an intent that the Spill Fund provisions be retroactively applied. In any event, they argue that there is no infirmity in retroactive application here, as the Fund provisions of the Act, in their view, create a remedy only, but do not create new substantive rights.

Plaintiff on the other hand argues that an interpretation of the words "shall be strictly liable" in N.J.S.A. 58:10-23.11 (g) when considered in their common meaning compels the conclusion that the Fund provisions of the 1977 Act were to be applied prospectively only. "Shall be," plaintiff says, implies some future date and some future spill or discharge. Plaintiff argues that application of the 1977 Act to it, for acts or omissions which occurred prior to the effective date of the 1977 Act would be improper.

Yet, plaintiff DEP has argued that the Spill Compensation and Control Act is applicable to defendants, whether or not there is a "current discharge." Can plaintiff DEP have it both ways?

In support of its position that the 1977 Act applies to defendants, plaintiff argues that the liability provisions are in fact remedial and create no new substantive obligations which did not exist at common law. On the other hand, DEP argues that the Spill Fund creates new substantive obligations on the part of the State and that Act, therefore, cannot be applied retroactively as to it.

Due to the potential possibility of a conflict of interest, the Spill Fund was made a party defendant on the counterclaims, and was represented by independent counsel. That result was also mandated by the State's affirmative defense to the defendants' counterclaims of failure to join a necessary party, i.e., the Spill Fund.

The Spill Fund resists imposition of liability and is joined therein by the intervenors, Mobil Oil Corp.; Chevron, U. S. A., Inc.; Texaco, Inc. and Exxon Co., U.S.A. They argue collectively, that a finding of Fund liability would be an impermissible, unintended and unfair retroactive application of the 1977 Act.

The Court permitted the oil companies to intervene in the action for the purpose of opposing the counterclaims. (4) Their application to intervene was based upon R. 4:33. The Court indicates that permission to intervene was not mandatory. R. 4:33-1. The Spill Fund's opposition to the application would have adequately protected intervenors' interests. Intervention was permitted under R. 4:33-2 because of the important contribution of the oil companies to the economy of this State and because of the disastrous financial effect possible as a consequence of this Court's decision. (5)

Defendants' counterclaims allege that the State DEP has failed to mitigate the pollution complained of and has, therefore,

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4. The oil companies are "major facilities" who, under the 1977 Act, are required to pay a tax "to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances." N.J.S.A. 58:10-23.11 (h). Prior to the filing of their motion to intervene, the oil companies had instituted an independent action in this court seeking a declaratory judgment that the Spill Fund provisions could not be applied retroactively. (Mobil Oil Corp., et al., v. State of New Jersey, et al., C-1110-78). That action has been consolidated with this action, State v. Ventron, C-2996-75.
 5. The Act provides for a rate of tax of \$0.01 per barrel. However, the 1977 Act provides that: In the event of a major discharge resulting in claims against the fund exceeding the existing balance of the fund, the tax shall be levied at the rate of \$0.04 per barrel transferred until the balance of the fund equals pending claims against the Fund ***. N.J.S.A. 58:10-23.11 (h) (b).

failed to discharge its obligations under N.J.S.A. 58:10-23.11 (f) to "remove or arrange for the removal of such discharge." Defendants argue that the State should have undertaken corrective measures and assessed the Spill Fund for the costs thereof. The Spill Fund is, in their view, strictly liable under N.J.S.A. 58:10-23.11 (b).

The defendants cannot prevail on the counterclaims.

IV. NATURE OF CROSSCLAIMS

Numerous crossclaims have been asserted between and among defendants.

Wolf's crossclaim against Ventron alleges fraudulent concealment of the gross mercury contamination in the soil. Wolf contends that all the elements of intentional nondisclosure are present and that under New Jersey law, fraudulent concealment in the sale of realty is as tortious as intentional misrepresentation. Wolf also charges Ventron with negligent concealment.

Ventron denies any intent to defraud Wolf and argues that it could not have done so as it had no knowledge, or should it reasonably have had any knowledge, of any latent contamination that might interfere with Wolf's intended use of the property. In any event, Ventron argues, the doctrine of caveat emptor applies. Wolf vigorously resists the application of the caveat emptor doctrine.

Wolf further crossclaims for damages and indemnification if he is held liable to the State based upon the covenant against

grantors' acts contained in the deed of conveyance which provides:

The grantor covenants that it has not done or executed any act, deed or thing whatsoever where- by or by means whereof the premises conveyed here, or any part thereof, now are or at any time hereafter, will or may be charged or encumbered in any manner or way whatsoever.

Ventron denies that it has done any act or deed to encumber the property and, in any event, denies the applicability of the covenant to the present situation.

Similarly, Rovic's crossclaim against Ventron alleges fraudulent and negligent concealment. Rovic seeks complete indemnification for any expenses incurred by virtue of its demolition and containment activities, that is, for lost profits and increased costs due to construction delays. Ventron's defenses to Rovic's claims parallel its defenses to Wolf's claims. Ventron further argues that it owed no duty to Rovic in the absence of privity of contract. Rovic, however, fashions itself a third-party beneficiary of the deed covenant from Ventron to Wolf.

Ventron's crossclaim against Velsicol seeks indemnification from Velsicol to the extent that Ventron is held liable for the acts of WRCC during the period of Velsicol's stock ownership -- 1960-1968. Ventron relies on a "control theory" as a basis for Velsicol's liability. Ventron (as does the State) argues that Velsicol exercised such control over the affairs and management of WRCC that Velsicol may be held directly liable for the acts of its 100% owned subsidiary by piercing the corporate veil.

Velsicol argues that the knowledge of its subsidiary may not be imputed to it, the parent, by virtue of its mere stock ownership. Its position is "that mere stock ownership by one corporation in another corporation is insufficient to render the former liable for the torts of the latter." citing Mueller v. Seaboard Commercial Corp., 5 N.J. 28, 34 (1950). It thus argues that a corporation must abuse the corporate relationship to the point where corporate formalities become a sham before the separate corporate identity of the subsidiary may be disregarded. It takes the position that normal participation, stock control, common directors and officers are not enough. It posits that the "corporate identity will be disregarded in equity only when necessary to do so in order to prevent fraud, deception, evasion or injustice." citing Cintas v. American Car and Foundry Co., 131 N.J. Eq. 419, 25 A. 2d 418 (Ch. 1942), 132 N.J. Eq. 460, 28 A. 2d 531 (E. & A. 1942).

Velsicol further argues that there must be some fraudulent act by the parent such as stripping the subsidiary of its assets or rendering it insolvent so as to result in injury to a third party before a parent may be held liable for the acts of its subsidiary. Velsicol denies that such was the case here and thus denies liability to any party.

In fact, Velsicol's position in this regard is that the merger of WRCC into Ventron renders Ventron fully accountable for WRCC's actions, including activities during the Velsicol years. This approach in Velsicol's view would preclude any recourse by

Ventron against Velsicol.

Ventron further alleges fraudulent concealment by Velsicol and claims that Velsicol, at the time of the transfer, fraudulently concealed the fact of the potential liability which might arise as a result of WRCC's prior activities. Ventron argues that it would not have acquired WRCC had it been aware of the alleged wrongdoing. Ventron claims that it acted in reliance upon Velsicol's misleading silence.

Ventron thus contends that Velsicol had full knowledge of the extent of the pollution and intentionally did not disclose the true facts to Ventron. This claim parallels the theory of the Wolf/Rovic claims against Ventron.

Velsicol denies any intent to defraud, denies having any knowledge which had not been passed on to Ventron, and argues that any knowledge of WRCC may not be imputed to it. It relies on the specific disclaimer in the stock purchase agreement of any warranty that "The Wood Ridge plant would not at some time entail alterations or other steps to comply with applicable Federal, State and Local environmental laws and regulations."

Velsicol in turn asserts that it is entitled to indemnification from Ventron on the theory of fraudulent concealment. Velsicol's thrust is that Velsicol took title to part of the allegedly contaminated property on June 28, 1967; that it was conveyed to Velsicol by WRCC; that WRCC fraudulently concealed these facts from Velsicol; that by virtue of the merger of WRCC into Ventron, Ventron is liable for WRCC's acts;

that Ventron, therefore, is liable to Velsicol for fraudulent concealment of the contamination of the Velsicol trust.

Ventron responds that Velsicol's position with regard to pollution of the Velsicol tract is absurd; that Velsicol arranged the land dividend; that Velsicol exercised actual control over WRCC between 1960 and 1968; and that Velsicol cannot now seek to exonerate itself from liability for the alleged pollution on the Velsicol tract for which it is primarily responsible by saddling responsibility upon Ventron. Ventron further argues that by reason of Velsicol's control of WRCC, Velsicol had or should have had any knowledge WRCC had, and that it should have, and, in fact, did know of the dumping of polluted waste material on the Velsicol tract by WRCC and by its processing predecessor, Berk.

Ventron and Velsicol both allege that Wolf and Rovic knew of the existence of mercury on the Wolf tract prior to the commencement of demolition and that they nevertheless permitted the demolition of the structures in a grossly careless and inappropriate manner. They seek indemnification by Wolf and Rovic under the New Jersey Joint Tortfeasors Contribution Act.

All crossclaims must fall except the crossclaim by Wolf/Rovic against Ventron, and there, recovery is to be limited.

V. INTRODUCTORY FINDINGS AND CONCLUSIONS - LIABILITY

Findings of fact and conclusions of law are made throughout this opinion. It seems appropriate, however, in a

case as complex as this that some specific determinations be made here and the reasoning discussed where necessary. Certain findings, of course, relate to more than one issue or claim. Many of the proposed findings of fact submitted by counsel are accepted and that acceptance will be clear in the results reached. By failing to mention any one or more of the hundreds of proposed findings, one should not conclude that the Court either accepts or rejects any particular conclusion.

A. MISCELLANEOUS BASIC FINDINGS OF FACT

1. Every operator of a mercury processing plant on the property here involved has contributed to the pollution of Berrys Creek. These include:

- a. 1929-1960 Berk
- b. 1960-1968 WRCC (A Velsicol wholly-owned subsidiary)
- c. 1968-1974 WRCC (A Ventron wholly-owned subsidiary)

In every case the pollution resulted in mainly the discharge of effluent from the processing procedure into Berrys Creek. Surface water flow over contaminated soil also contributed.

2. The entire tract is polluted. The Wolf tract where the processing plant stood is heavily polluted. Most of the concentration is within the so-called "Wolf containment system" and is some distance from Berrys Creek. The Velsicol tract has polluted or is polluting Berrys Creek by virtue of:

- a. dumped polluted materials on the Velsicol tract;
- b. movement of surface water both within the so-called drainage system and in general; and perhaps by
- c. leaching or movement of ground water.

3. Generally, all plant waste waters were directed from the southeast corner of the Wolf property through pipes and open drainage ditches over the Velsicol property and into Berrys Creek. Until 1968 these waste waters were discharged in such manner directly, without treatment. In 1968 steps were first taken by WRCC/Ventron to study and treat the plant effluent.

a. In March 1968 Metcalf and Eddy, Inc. was engaged to make such a study.

b. In June of 1968 the V. Notch Weir was installed at the southeast corner of the plant property to aid in measurement of plant effluent.

c. In December 1968 the Metcalf and Eddy report was submitted showing high levels of mercury pollution in the effluent.

d. The State and WRCC/Ventron tried to work together and by August 1970 the effluent was being treated by a combination of neutralization, settling and chemical treatments. The level of mercury in the effluent was still unsatisfactory.

4. It was about this time (August 1970) that tests were made of the discharges into Berrys Creek. The polluted effluent plus any pollutants picked up as the fluid traversed the Velsicol property, discharged into Berrys Creek. Samples taken in Berrys Creek showed mercurial concentrations higher than anywhere in the world in fresh water sediment.

5. WRCC/Ventron took steps to establish its initial treatment program. It was discovered that the total plant effluent

was more polluted than the treated plant effluent. Investigation of this residual problem continued. The Court has never been certain of the exact cause, but it is clear that it was the result of one or more of the following problems:

- a.. some waste water being untreated; and
- b. residuals, leaching into the lines by polluted ground water or surface water.

It was Horner (EPA) in September of 1971 who advised that it was his strong feeling that the problem was in groundwater contamination.

6. As late as August 1971, mercury in the total plant effluent was on the average 50% higher than in the treated effluent.

7. While it was true that the regulatory agencies directed WRCC/Ventron to improve the situation, for instance, by improving housekeeping procedures, they offered no specific suggestions and it was, in fact, WRCC/Ventron that was educating these agencies, cooperating with them and learning with them. This cooperative effort continued as did the pollution. The agencies kept on requesting that WRCC/Ventron undertake studies and marine samplings. They did this and all learned together of the enormity of the problem. Dye tests were conducted but were not conclusive. Soil samples were taken and mercury was found in the groundwater, especially next to the plant, where dumping had taken place over the years.

8. As late as January 1972, WRCC/Ventron cited five possible sources (other than plant effluent) to explain the residual problem:

- a. groundwater infiltration;
- b. surface runoff into storm sewers;
- c. surface runoff from overflowing collecting pots and basins;
- d. leaching of residual mercury into the wastelands, and
- e. discharge of contaminated "non-mercurial" streams into the waste system.

9. The process of give and take, suggestions and action, cooperation and progress continued between the plant operator and the governmental agencies. Yet in late 1972, the problem persisted. Capital expenditures were projected and all that was feasible was being done (except shutting down the plant). As progress was made by WRCC/Ventron, the regulatory agencies pressed on; new standards were set; new legislation was passed; the Hackensack Meadowlands were being developed and the Sports Authority became involved; and in the spring of 1973, a decision was made to discontinue operations of WRCC and to sell the property.

10. Assessments of the situation continued. Several interested buyers of the business and of the land appeared on the scene. Wolf and Ventron finally entered into the option agreement of February 5, 1974.

B. MISCELLANEOUS CONCLUSIONS

1. The State has failed to prove specific statutory or regulatory standards pertaining to mercury in the effluent emanating from the plant. Such failure to establish specific standards, however, is not fatal to the State's case either under the statutes or under the nuisance theories. That there were effluent discharges while the plant was in operation which resulted in a dangerous and hazardous mercurial content in Berrys Creek is apparent. The only fact question regarding mercury movement which remains open is whether after the plant ceased operations in April 1974 mercury reaches Berrys Creek via ground water leaching from the premises in question and if so, does that mercury create and/or present a further hazard.

The actions of the parties, the closing of the plant and the testimony of the experts, all lead the Court to the firm conclusion that prior to April 1974, despite all good faith efforts, the waste effluent (by the time it reached Berrys Creek after traversing the Velsicol land) was at a dangerous level. Of course, it was worse before the effluent was treated, and of course, as less mercury was left in the effluent the level decreased, but the problem was never solved. The plant effluent was the primary source of the pollution.

The effluent was further contaminated as it traversed the Velsicol property (in the drainage system or on the surface). Berrys Creek was thus being polluted at least until late April.

Surface water during past years and today, running over the polluted Velsicol land, undoubtedly added to the mercurial content in the creek, thus, a good reason to urge development of the land as a means of avoiding surface water runoff. In the last few years there is no data available to indicate how much mercury is reaching Berrys Creek from the Veliscol property either by way of any drainage system through surface water or through leaching. The difficulty in monitoring is highlighted by the fact that Berrys Creek and the surrounding area is affected by tidal waters.

2. Mere ownership of property without more is insufficient as a basis for imposing statutory liability. Ownership with knowledge, combined with acquiescence in the acts of others or with a failure to act, is a basis for statutory liability.

3. Defenses of accord and satisfaction, laches, estoppel, unclean hands and statute of limitations are not available here. The limitations period provided in N.J.S.A. 2A:14-10 is inapplicable to any of these statutes, which are merely quasi-penal. Surely, the statute of limitations did not run against the State on its nuisance theories. Clearly, there was a continuing nuisance.

4. The State has met its burden of proof as to the pollution of Berrys Creek. However, it has not demonstrated that pollutants are now entering that waterway from the premises in question through ground water. This gap in the State's case, however, does not preclude future tests and future liability on the part of the defendants Berk, WRCC/Ventron and Veliscol.

The problem was not unconstitutionally vague statutes but rather individuals, motivated by public or private interests, who failed to act definitively.

C. THE STATE'S CASE - LIABILITY OF DEFENDANTS

1. There is liability in varying degrees under the 1937 Act, the 1971 Act and on the theories of statutory and common law nuisance.

2. The liability, in the case of Berk and WRCC is direct and primary. The liability of Velsicol is partly direct and partly derivative under the so called "control theory." The liability of Ventron is direct under the merger theory, and derivative under the "control theory."

3. The Court rejects the joint and several liability theory espoused by the State as between Ventron and Velsicol. Those defendants may not be held jointly and severally liable. Their liability is several. As between those defendants the Court is able to and will make a rough apportionment of responsibility. City of Newark v. Chestnut Hill Land Co., 77 N.J. Eq. 23 (Ch. 1910); Jenkins v. Pennsylvania R. R. Co., 67 N.J.L. 331 (E&A 1902)

"In the usual case the interference with the plaintiff's enjoyment, by noise, smoke, odors, pollution or flooding is regarded by the Courts as capable of some rough apportionment according to the extent to which each defendant has contributed, and it is held that each will be liable for only his proportionate share of the harm." Prosser, Hornbook of the Law of Torts (4th Ed. 1971) at 608.

This applies only as between Velsicol and Ventron. As between Berk and WRCC the liability is joint and several. The method used as between Velsicol and Ventron cannot be used as between Berk and WRCC. Standard principals of joint and several tort liability apply.

Considering the number of years involved, the actions of Velsicol and Ventron and the basis of liability referable to each, the responsibility for the acts of WRCC should be shared equally. Velsicol, in addition shall have the responsibility of preventing pollution caused by surface water runoff on its 33 acres.

D. LIABILITY OF THE STATE OR THE FUND

1. The Fund constitutes a source of money which is available (and has been available) to abate problems such as the one before the Court.

2. Such use of the Fund's money does not constitute an impermissible retroactive application of the statute. Such use is a proper means to remedy a hazardous or dangerous situation caused by a spill or discharge. This is the result contemplated by the Legislature.

3. The utilization of the Fund money does not and will not preclude ultimate recovery of the money expended from those who caused or created the situation.

4. Where any element of expense (remedy) is not chargeable or collectible from any defendant or where the expenses are the result of an inappropriate State action or

inaction, the Fund is the appropriate source of funds to remedy the hazardous situation.

5. The Fund is not available, however, for payment to any of these defendants on the theory that any such defendant has sustained damages through the discharge of hazardous substances. Thus, the counterclaims against the State must fall. The State's failure to act does not make plaintiff affirmatively liable to any defendant in this case.

6. It was (and is) plaintiff's obligation to take a corrective action. This is especially true of the situation in Berrys Creek, where there is pollution. At least since 1977 funds have been available. From 1971 to 1977, the source of funds for State action was not apparent. The 1977 Act provided a source.

E. THE WOLF/ROVIC CLAIMS

Ventron is liable for the costs incurred in making Wolf's property available for the use intended by Wolf. The elements of damages which apply are:

1. The costs of demolition over and above that which reasonably would have been anticipated in demolishing a chemical plant;
2. The costs of "containment system" insofar as it added to the reasonable cost of foundation and footings; and
3. Legal fees of Wolf necessary to defend the action of the State (based on the deed covenant).

The actions of Ventron as seller were far from honorable. Wolf has proven the necessary elements of fraudulent concealment.

Wolf's failure to attempt to mitigate damages, and his continued efforts as an expert real estate developer to further the project after he had both full knowledge and a choice does not change the result, but does limit his right to recovery.

Wolf, however, who was not liable, was forced by State directives and WRCC/Ventron inaction to take affirmative steps to correct the problem. Wolf should be made whole. Whether Wolf utilized the services of Rovic or some other contractor, Ventron is liable to Wolf for those costs. Whether those sums are paid directly to Wolf or to Rovic matters not. Ventron must pay for the work which was necessitated by its actions and inaction.

F. REMEDY

The remedy involves directives to the State, liability of the Fund, and liability of the defendants. The solution will cover a period of time during which certain funds will have to be expended, certain restrictions will have to be enforced, and certain steps mandated. The "remedy" outline will be the subject of another portion of this opinion and undoubtedly will be the subject of more detailed supplementing opinions as data is gathered and as development of the land progresses.

VI. DISCUSSION-- STATUTORY LIABILITY - 1937 and 1971 ACTS: Piercing the Corporate Veil; Merger.

Plaintiff alleges that all defendants have violated N.J.S.A. 23:5-28 in its original and amended forms, as well as

the subsequent statutory enactments providing for environment control and regulation, N.J.S.A. 58:10-23.1 et seq. and N.J.S.A. 58:10-23.11 et seq.

As originally enacted in 1937 N.J.S.A. 23:5-28 provided that:

"No person shall allow any foodstuff, coal tar, sawdust, tanbark, lime, refuse from gas houses, or other deleterious or poisonous substance to be turned into or allow to run into any of the waters of this state in quantities destructive of life or disturbing the habits of the fish inhabiting the same, under the penalty of two hundred dollars for each offense." (Emphasis added).

In 1968 after WRCC was sold to Ventron the statute was amended as follows:

"No person shall put or place into, turn into, drain into, or place where it can run, flow, wash or be emptied into, or where it can find its way into any of the fresh or tidal waters within the jurisdiction of this State any...deleterious, destructive or poisonous substances of any kind...in case of pollution of said waters by substances known to be injurious to fish, birds or mammals, it shall not be necessary to show that the substances have actually caused the death of any of these organisms." (Emphasis added).

The maximum penalty was increased from \$200 for each offense to \$500 for the first offense and \$1000 for any subsequent offense.

Then in 1971 the last sentence quoted above was amended to read as follows:

"In a case of pollution of said waters by any substances injurious to fish, birds or mammals, it shall not be necessary to show that the substances have actually caused the death of any of these organisms."

The penalty was increased to no more than \$6,000 for each offense. Clearly, this statute and its amendments, while not criminal statutes, are quasi-penal and may not be applied retroactively.

N.J.S.A. 58:10-23.1 the "New Jersey Water Quality Control Act of 1971" was enacted with the goal of "the prevention and abatement of pollution of the waters of the State resulting from the discharge therein of petroleum products, debris, and hazardous substances..." (Senate Bill No. 928, L. c. 173).

The Act states that:

"The discharge of petroleum products, debris and of hazardous substances into the waters of this State is inimical to the best interests of the people and constitutes a threat to the environment." N.J.S.A. 58:10-23.2

N.J.S.A. 58:10-23.4 provides:

"The discharge of hazardous substances, debris and petroleum products into, or in a manner which allows flow or runoff into or upon the waters of this State and the banks or shores of said waters is prohibited."

The plain language of the last cited section (and, in fact, of all the relevant statutory enactments) requires an act, some conduct by the entity sought to be held. New Jersey v. Central Jersey Power and Light, 69 N.J. 102 (1976); State v. Exxon, 151 N.J. Super. 464 (Ch. 1976). Not knowledge necessary, but an act. The purpose of all of these statutes and logic dictates that there be an affirmative act with or without knowledge or a failure to act with knowledge.

If any defendant has committed such a statutorily proscribed act or has failed to act where required to act, the primary determination is the date of the action or inaction. These quasi-penal statutes may not be retroactively applied.

The Court abandons, for the moment, the chronological approach and goes to a discussion of the 1971 Act. This seems appropriate in light of the greater emphasis by the State on that Act than on the 1937 Act. The 1977 Act must be treated separately.

In order to determine what acts are proscribed by the 1971 Act, the term "discharge" must be considered. "Discharge" is defined in N.J.S.A. 58:10-23.3 (c) as follows:

"Discharge shall mean, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping."

As Judge Kentz stated in State v. Exxon, 151 N.J. Super. 464 (Ch. Div. 1977), "these verbs connote some activity, some human agency, even if that activity is accidental or unintentional." 151 N.J. Super. at 471.

The State argues that the statute is not limited to acts set in motion directly and immediately by human behavior, and that, therefore, leaching or exuding or other phenomena may be read into the statute. Thus, the State argues that mere ownership of polluted land equals liability where the pollutant through leaching or otherwise (i. e., surface water runoff) either reaches or has the capacity to reach the waters of this State. This line of reasoning would encompass the "time bomb"

situation which the State employs, in part to avoid any retroactively problem, by attempting to establish a post-1977 discharge.

The definition of "discharge" may not be so broadly interpreted. The Court has heretofore rejected that theory with respect to U. S. Life. To so hold would be contrary to the sound rules of statutory construction and violate the standards of fair play and justice we hold so dear. The absurd consequence of adopting the State's theory could be that the innocent purchaser of a home built upon polluted land would be held liable for millions of dollars in damages to contain the pollution or abate the nuisance. I join Judge Kentz in rejecting that theory.

While the specific acts which may be actionable are not as limited as defendants insist, there is a clear requirement of some human activity or knowledgeable inactivity which results in hazardous substances finding their way into the waters of this State.

As for the 1937 Act, plaintiff argues appropriately that the statute creates strict liability. The Legislature can designate the mere doing of an act as a crime, even in the absence of mens rea. State v. Kinsky, 103 N.J. Super. 190 (Cty. Ct. 1968). It is the acts of the defendants that create strict statutory liability under the 1937 Act. Plaintiff, in order to prevail under the Act in its original form, must show

that the discharge was in quantities which disturbed the habits of or destroyed the lives of the fish. As stated hereinafter, plaintiff has established that by the preponderance of the evidence. During this period of time (1960-1974) the dangers of mercury were becoming more and more apparent, although the ultimate degree of harm may not have been and still may not be known. The enormity of the problem may not be known for years to come. Nevertheless, mercury was "known" to be dangerous even before the time of the enactment of the 1968 amendment. Thus, for post 1968 violations, plaintiff need not demonstrate actual death of any organism. Furthermore, the 1971 amendment eliminates the requirement of proving death of organisms, regardless of whether the substances were known to be injurious.

A. WOLF AND ROVIC

Have defendants Wolf and/or Rovic "discharged" within the meaning of the 1971 statute? The Court thinks not. While the demolition-construction may have "moved" some of the pollutants around the Wolf site, there is no adequate proof that any such action added to the pollution in Berrys Creek--a sine qua non to liability under the State's case.

A technical violation of the statute which might justify a fine is not here considered. Even if one could read the statute in such a technical manner as to find that Wolf "discharged"--the resulting pollution in the waterway of the State have not been shown. If there was any, it was less than

"de minimus." Even if the leaching theory of Dr. Joselow has merit, one must find that Wolf and Rovic added no pollutants to the property. They created no problem which did not exist prior to its acquisition of the land.

The State urges this Court to ignore State v. Exxon, supra. It urges this Court of equal standing to rule differently from Judge Kentz. This Court would not hesitate to do so on any distinguishable issue of fact, but equally, this Court will not hesitate to rely on the rationale of Exxon where, on the issue under discussion, that rationale is sound and logical.

In the Exxon case, defendant ICI America, Inc. (hereinafter ICI) did not in any way change the situation that existed at the time of the acquisition of the property. ICI did not act. It was a mere owner of property. Here Wolf and Rovic acted, but they did not act improperly. They did not change the situation that existed when they acquired the property. They did no act which would establish liability under the 1971 Act.

Judge Kentz rejected the State's argument that simple ownership of land without any affirmative act would be sufficient to impose liability. State v. Exxon, 151 N.J. Super 464 (Ch.Div. 1977) at 473. This Court adopts his reasoning and finds that no liability may be imposed upon Wolf.

The Supreme Court in State v. Jersey Central Power & Light Co., 69 N.J. 102 (1976) held that under N.J.S.A. 23:5-28 a finding of cause-in-fact was essential to a finding of liability.

Drawing upon that decision, Judge Kentz in his opinion in Exxon stated:

"The philosophy, purpose and prohibitions of N.J.S.A. 23:5-28 are identical to those of N.J.S.A. 58:10-23.1 et. seq., since the two statutes were enacted at the same time as part of the Water Quality Improvement Act. The two statutes must therefore be read and construed in pari materia. Accordingly, the court's determination in Jersey Central Power and Light Co. that causation is a necessary element to a finding of liability under N.J.S.A. 23:5-28 is equally applicable to a finding of liability under N.J.S.A. 58:10-23.1, et. seq. State v. Exxon, 151 N.J. Super at 475."

The rationale is sound. The question, therefore, is whether the result would have happened just as it did whether or not Wolf had acted as he did. This Court must answer that question in the affirmative.

But more importantly, the Court can and does find as a matter of logic and statutory interpretation, that the Legislature, in enacting the 1971 Act did not intend to impose liability upon one in Wolf or Rovic's position, one who may technically have discharged but who did so as a result of good faith efforts to prevent the pollution using the techniques available in 1974.

Wolf retained experts to determine the extent of the mercury pollution and devised and implemented an extensive containment system. Wolf and Rovic took steps to ensure that any residual mercury in the rafters or in containers was kept out of the environment. Demolition water was captured, pumped into storage tanks and carried away from the premises. Wolf

and Rovic, at the direction of the regulatory agencies, investigated subsoil conditions. As a result, the State, Wolf and Rovic became aware of the huge quantity of mercury in the soil and of the resultant ground water contamination. Wolf, Rovic, their experts, the DEP and the EPA investigated the possibility of a containment system and a containment system was installed within which the major mercury pollution on the Wolf tract is now held.

The evidence is conflicting as to whether the system is completely effective or whether mercury is leaking. Even if mercury is leaking, there is no adequate proof that the pollutants will reach Berrys Creek via ground waters over the Velsicol 33 acres. Monitoring in the future will be necessary to make that determination. Even if there is leakage and even if some contaminant is reaching Berrys Creek, Wolf and Rovic are not liable. They purchased in good faith from Ventron. They did not pollute.

The containment system installed by Wolf and Rovic was substantially the one approved by the State. (That the approval was originally coupled with requirements for a deed restriction and monitoring in the future at Wolf's expense, which Wolf rejected, is not important.) It was Wolf, who with money and time invested, had to act under pressure by the State, despite the lack of statutory obligation to do so. The primary obligation was that of the land polluters, Berk and WRCC.

The subsequent enactment of N.J.S.A. 58:10-23.11 (f) lends support to the holding that Wolf and/or Rovic are not liable. That section states in pertinent part:

Nothing in this section is intended to preclude removal and cleanup operations by any person threatened by such discharges, provided such persons coordinate and obtain approval for such actions with ongoing State or Federal operations. No action taken by any person to contain or remove a discharge shall be construed as an admission of liability for said discharge. No person who renders assistance in containing or removing a discharge shall be liable for any civil damages to third parties resulting solely from acts or omissions of such persons in rendering such assistance except for acts of omissions of gross negligence or wilful misconduct. (Emphasis supplied).

Ventron argues that Wolf should be held liable to the State as a result of flooding, from the smashing of pipes during demolition process. The site was flooded with water for four days. Ventron argues that the water was laden with years of dust and contaminants which as a result poured off the site into Berrys Creek. The allegation has not been proven. Rather, if some contaminants escaped the result would have been de minimus in comparison to the total pollution.

The above analysis applies equally to liability under the 1937 Act and its amendments. Wolf and Rovic did no acts proscribed by that Act. They were not polluters. Wolf and Rovic acted in good faith and without negligence to prevent soil contamination and to contain the existing contamination. These good efforts cannot serve as the basis for liability.

B. WRCC AND BERK

WRCC discharged hazardous substances and thus violated the 1937 Act in its original form and as amended as well as the 1971 Act. It continued the operation of the processing plant and thereby added to the mercurial contamination of Berrys Creek through the discharge of the plant effluent into that waterway. Berk is liable under the 1937 Act in its original form. The 1971 Act while not a criminal statute is penal in nature and may not be retroactively applied to defendant Berk.

Until 1968, the 1937 Act required a showing that a discharge to be actionable be "in quantities destructive of life or disturbing the habits of the fish..." N.J.S.A. 23:5-8. The State has made such a showing, if not by producing a pre-1968 fish, then by the preponderance of logical evidence. Both Berk and WRCC sent highly polluted effluent into Berrys Creek from 1929 until 1974. The toxic-hazardous pollutant was mercury in one form or another. Berrys Creek, is, in fact, highly polluted as a result of these discharges. The Court is convinced by the expert testimony that during those years these discharges were, "destructive of life or disturbing the habits of fish..." As to those operating companies no other conclusion is possible under the staggering statistical data before the Court.

WRCC (and before it, Berk) dumped waste material on the Velsicol tract. WRCC thus committed an expressly prohibited act of discharge, N.J.S.A. 58:10-23.3 (c).

That statute, effective June 1, 1971, prohibits acts of discharge "in a manner which allows flow or runoff into or upon the waters of the State." N.J.S.A. 58:10-23.4. The State has demonstrated that WRCC dumped polluted waste material on the Velsicol tract allowing surface (and perhaps ground) water to carry pollutants into Berrys Creek. It has also demonstrated that the effluent system discharged pollutants into and on the Velsicol land on the way to Berrys Creek. The substance was "hazardous" within the contemplation of N.J.S.A. 58:10-23.3 (b). WRCC actively polluted and discharged hazardous substances in violation of the 1971 Act.

C. VELSICOL

Velsicol is "liable" for several reasons:

It was a corporate owner of WRCC and an entity which the legislature intended to include within the statutory control scheme. The indicia of control necessary where strict liability is imposed by statute need not be as extensive as in the usual case where one attempts to "pierce the corporate veil." One must, in a public interest case, examine the nature of the business, the ability to control and the morality or immorality of a failure on the part of the parent company to act.

Velsicol formed WRCC to purchase the Berk operation in 1960. Berk was polluting. WRCC continued to pollute, Velsicol may not have known the consequences of the actions of WRCC but it did know, or should have known that chemical mercurial wastes were being discharged. Even if Velsicol had not, in fact, dominated the affairs of WRCC (and it did), it had the ability through its 100% stock ownership to control those acts of WRCC

which might affect the public and the environment.

WRCC was created for the sole purpose of acquiring the assets of Berk and continuing the business. Velsicol was in a related and compatible business. Velsicol personnel, directors, and officers were constantly involved in the day-to-day operation of the business of WRCC. Quality control of WRCC was handled by Velsicol. In general, WRCC was treated as a division of Velsicol.

Velsicol's goal was economic gain. It used WRCC for that purpose. It must take the responsibility for the risks that accompany a business venture with environmental damage potential.

Aside from the derivative liability emanating from the WRCC operation, liability falls upon Velsicol by virtue of its ownership of the 33 acres received from WRCC as a land dividend. It was a landowner with knowledge of the dumping pollution and problems both before and after it acquired the acreage and it accepted dumping of polluted waste material on its acreage without objection and without attempting to protect the environment. Thus, Velsicol is derivatively liable, where WRCC is liable, for the period of its stock ownership 1960-1968, and directly liable as an owner, with knowledge under the 1971 Act, from 1971 until the dumping ceased in 1974.

D. VENTRON

Ventron's liability may be held to be direct or derivative. It is direct by virtue of the merger of the WRCC into Ventron in June 1974, shortly after Ventron sold the facility at Wood-Ridge. The "Certificate of Ownership and Merger" which was filed with the Secretary of State of Nevada, expressly

provided that Ventron would assume the liabilities and obligations of WRCC. Furthermore, the merger would have resulted in the assumption by Ventron of all of WRCC's liabilities, as a matter of law. N.J.S.A. 14A:10-6 (e).

Although not essential to the determination of Ventron's liability, the Court finds that Ventron so dominated the affairs of WRCC as its sole shareholder from 1968 to 1974 that there was not such a separate entity as would allow avoidance of responsibility to the public.

Ventron was, therefore, through WRCC, a violater of the Acts. Ventron management executives took over the positions that had been held by Velsicol executives. The new president of WRCC, Joseph Bernstein, who was also Operations Manager of the Metals Chemical Division of Ventron stated that he regarded Ventron and WRCC to be "different pockets of the same pair of pants."

There is legal and factual justification for the liability of Velsicol and Ventron to the extent it arises because the corporate veil is pierced. The Court recognizes that the corporate form is a mode by which the stockholders of a corporation may avoid personal liability. Properly handled, the protection may be complete. The Court does not, however, conceive the governing standard to be the same for stockholders seeking to avoid the usual contract or tort liability as for a 100% stockholder, who, with knowledge, allows the operating corporation to violate environmental standards, create or continue a public nuisance, or in such a manner allow that subsidiary to act in the

face of the policy of the State. Both Velsicol and Ventron had the ability through its 100% stock ownership to control its subsidiary. Liability is justified where the parent, with knowledge, fails to act. The corporate shell may not be used as a means to evade the thrust of an environmental control statute.

It is one thing to avoid, through a corporate entity, liability for private torts or contract breaches of a subsidiary. If these were the sole problems before this Court, the determination of dominance, control and whether the corporate veil should be pierced might be more difficult and the many pages of testimony and the lengthy legal memoranda would have to be analyzed in depth. The memoranda of both Ventron and Velsicol attempt such an analysis, and each item of alleged control is discussed in an effort to convince the Court that there was such dominance by the other as would justify holding the other parent liable for the actions of its subsidiary. But each vehemently denies its own control. While the Court might agree that any given item of proof alone would not justify the imposition of liability on these parent corporations, the number and nature of the acts involved lead to the inescapable conclusion that the parent corporations ran the operations during their respective periods of stock ownership.

The public policy of this State demands that with respect to the public need for environmental protection, the usual standards cannot and should not apply. Whether or not the subsidiary is or is not solvent, is not the question. If one,

with knowledge of the acts and with the ability to control the activities of a subsidiary by failure to act permits the subsidiary to endanger the environment, then as a matter of public policy, the parent must face the responsibility of its permissive inaction.

In the instant case, not only was there inaction with knowledge and the ability to control, there was in fact such interation and actual control exercised over WRCC by Velsicol from 1960 to 1968, and by Ventron from 1968 to 1974, that a finding of liability is inescapable.

VII. STATUTORY LIABILITY OF DEFENDANT
STATE FUND - 1977 ACT

The "Spill Compensation and Control Act", which became effective on April 1, 1977 repealed the 1971 Act. The major difference between the two statutes in this Court's view was the increased burden placed upon the State by the express requirement that the State act and by the creation of the Spill Fund.

The 1971 Act mandated that any person responsible for the discharge immediately remove same. If the responsible party failed to do so, the Department was authorized to contract to have it done and to seek reimbursement. N.J.S.A. 58:10-23.5.

The 1977 Act, however, requires more:

"Whenever any hazardous substance is discharged, the department shall act to remove or arrange for the removal of such discharge, unless it determines such removal will be done properly and expeditiously by the owner or operator of the major facility or any other source from which the discharge occurs. N.J.S.A. 58:10-23.11 (f). (Emphasis added).

Whether this change may be applied to the State under the circumstances of this case is dealt with later in this section. However, the Court mentions this change at this point to emphasize that this change, the creation of a new remedy, is the change of significance to the present case.

While the 1977 Act creates this new remedy, it also signals a change in substantive law. However, the Act creates new bases of liability, and thus, may not be applied retroactively to any of the defendants in this case.

Several substantive differences appear on the face of the 1971 and 1977 Acts. First, the legislators redefined the meaning of the term "discharge." In so doing, they both expanded and limited the meaning of the term, and perhaps created liability where none existed before.

Discharge is defined in the 1977 Act as:

...any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters of the State or onto the lands from which it might flow or drain into said waters, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State.
N.J.S.A. 58:10-23.11 (b) (h).

The State has argued that there has been a release under its time bomb theory; thus, perhaps an act or result not covered prior to the enactment of the 1977 Act.

On the other hand, certain words were omitted from the 1977 Act. The phrase "but is not limited to" has disappeared. The Court could well state that this deletion was intended to limit the meaning of the term "discharge" strictly to those verbs expressly stated. Obviously, however, that in itself would not create new liability.

Yet it remains quite possible that the 1977 Act may give rise to liability for acts or omissions which would not have been actionable under the prior Acts. Furthermore, the Act has imposed greater penalties. To impose liability for acts which prior to April 1, 1977 may not have been actionable is impermissible. The Court is reluctant to apply this statute retroactively as to any of the defendants. As the Supreme Court stated in Rothman v. Rothman, 65 N.J. 219, 224 (1974):

(I)n construing a statute its terms will not be given retroactive effect "unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the legislature cannot otherwise be satisfied." Kopczynski v. County of Camden, 2 N.J. 419, 424 (1949). See also La Parre v. Y.M.C.A. of the Oranges, 30 N.J. 225, 229 (1959); In re Glen Rock, 25 N.J. 241, 249 (1957); Nichols v. Bd. of Education, Jersey City, 9 N.J. 241, 248 (1952). (emphasis added)

The language in N.J.S.A. 58:10-23.11 et. seq. does not convince the Court that the legislature intended that the statute be applied retroactively to these defendants. Furthermore, the intent of the Legislature will be satisfied without the retroactive application of the 1977 Act to the defendants here held liable.

The result, however, is different as to the State. The State could, should and still may draw upon the Spill Fund by virtue of N.J.S.A. 58:10-23 (f), for the necessary funds to remedy the situation. It is clear that the Legislature intended by enacting the 1977 Act to provide an immediate and effective method to correct pollution problems in this State, even if that required retroactive application.

Furthermore, the purpose of the Legislation would not be satisfied in this case without such a retroactive application of those remedial provisions.

The various acts must be read in pari materia. The 1937 Act, and its amendments, the 1971 Act and the 1977 Act contain enough ambiguities to have justified hundreds of pages of argument on legislative intent; on the meaning of terms and on the retroactive effect of those acts. Many of the proofs create conflicts. The rules of statutory construction are called into play time and time again to give meaning to the legislative scheme.

Some aspects of that legislative scheme nevertheless come through "loud and clear." They are:

1. Pollution must be corrected.
2. The polluters are primarily responsible.
3. The correction of pollution is the responsibility of those engaged in those economic industries or enterprises that result in pollution.

4. When those responsible do not act or where there is a delay in acting, the state must proceed with the remedy, using Fund money if necessary.

Thus, once actionable pollution is found, the Legislature contemplated that liability would fall upon the operators, landowners, and corporate owners, who directly or indirectly profited (or contemplated profit) from the process that caused the problems. Those who acted or allowed others to act to cause the pollution must bear the economic burden of correcting the problem. However, the Legislative scheme also recognized the responsibility of the State.

The defendants have argued that the State failed to take the prompt remedial action required of it by the Spill Act. The Court recognizes that, to some degree, the State's actions were less than forceful, less than prompt, and perhaps somewhat misleading. These defendants, however, cannot avail themselves of a remedy by way of damages against the State.

The defendants heretofore held liable are primarily responsible for the cleanup. That the State should have and could have acted does not relieve the liable defendants of the primary responsibility. The Spill Act was enacted for the protection of the public and the environment, not as a crutch to violators of the very Act for which the Fund serves as a remedy. That the 1977 statute requires the State (DEP) to act affirmatively and gives it a source of money to clean up a spill or

discharge of hazardous material does not believe any of the defendants herein of their responsibility. Rights to the Fund are in the public. It is for the benefit of the public and the environment that the 1977 Act mandated action and provided funds.

Nor may defendants Wolf and Rovic, not held here liable, recover any damages on their counterclaim against the State. None of the defendants are such "other persons damages by such discharge" within the meaning of N.J.S.A. 58:10-23 (a).

While the Court finds that the State, through the Fund or otherwise, is not liable to the defendants, the Fund is strictly liable for cleanup costs. The State had an obligation to act where those responsible did not act to remove the pollution.

The Spill Fund provisions may be applied to spills whenever they occur. There is no constitutional impediment to the retroactive application of this remedy.

The Court, therefore, declares that the Spill Fund provisions of the Spill Compensation and Control Act were intended by the Legislature to apply to spills of hazardous substance, regardless of when they occurred, that is, prior to or subsequent to the passage of the Act. It is not necessary that the spill have occurred after 1977. Thus, the fact that there is no conclusive proof of discharges subsequent to the Act's effective date, does not absolve the State from its obligation to remedy the serious pollution problem where no one else does so. In any event, no harm has resulted from the present law suit instituted by the State since the proofs do not show any present danger.

The language of the statute is mandatory. The State must act if the responsible party does not. The legislative intent in its creation of the Spill Fund was to require the State to act promptly to clean up the pollution and to finance initially, though subject to reimbursement, the cost of such cleanup by calling upon the Spill Compensation Fund.

The Fund and the oil companies argue that it is simply not possible that the Legislature could have intended to cover all spills, because the imposition of such a heavy tax upon the oil companies might force them out of New Jersey, a result which would be disastrous to the economy of the State. Perhaps the oil companies would leave. The Court doubts this. However, the Act clearly provides for that increase in tax and the Court believes there was a reason for it. It is apparent that the Legislature had in mind other great assets of our State: the resorts and beaches. Foremost perhaps was the concern with the health and safety of the people of this State. The Legislature was concerned with preserving the beauty of our State and protecting the welfare of its citizens. Perhaps the resultant legislation may weigh heavily upon the industries taxed, but surely the Legislature balanced all the interests involved before it created the Spill Fund.

The Court may and will direct the State to act. Such mandatory injunction may require the use of fund monies if other sources are not available. What the 1977 Act provides

is a means to an end. No longer will the Legislature allow a hazardous environmental situation to continue while alleged polluters litigate with the State. The DEP shall act. The public is to be protected. Dollars are available from the Fund. To the extent that the cost of cleaning up the situation exceeds the amount which can be recouped from those liable--so be it.

Of course, logic dictates that the other remedies available to the State/DEP such as injunctive relief and/or damages may still be properly utilized in the appropriate case. It is in the emergent situation, the unusual situation, the situation where liability cannot be established or where those liable do not have sufficient assets or refuse to act that the 1977 Act requires State action and utilization of Fund money.

The Court finds no impediment to its applying the 1977 Act provisions to the State while denying recovery to the State against these defendants under the same Act. The Fund provision creates a remedy. However, no new substantive liability can be created against the defendants. If the legislature intended retroactive liability it could have so stated.

On the other hand, if it did not intend the State to be responsible for cleanup, its policy statements would mean little. A remedy has been fashioned, and the State is given a right of indemnification. The purpose of the Act is clearly stated.

The Act specifically provides that it shall be liberally construed so as to foster the general health, safety and welfare of the people of New Jersey. N.J.S.A. Sec.58:10-23.11. This policy requires the State to act where necessary. Since there is a liability under other Acts and for nuisance the State may obtain relief against those liable by way of damages and indemnification.

VIII NUISANCE LIABILITY

As an alternative basis for liability, the State alleges that the defendants are liable as a matter of law, for creating or maintaining a public nuisance on the subject property by violating the 1937, 1971 and 1977 Acts. Since the court has heretofore determined that no defendant is liable under the 1977 Act, the question arises whether the 1937 or 1971 Acts define a public nuisance as a matter of law by which those defendants who have violated those Acts will be liable. The 1937 and 1971 Acts are strict liability statutes which do in fact define a public nuisance. Thus the State must prevail on its statutory nuisance theory.

The State, through its legislative process, and in the exercise of its police power has the authority to declare what shall be deemed nuisances. The Legislature may provide for suppression and abatement of nuisance. The Legislature may declare an act to be a nuisance which was not such at common law once it determines that the conduct is detrimental to the health, welfare or morals of the people of the State; Mayor and Council of Alpine Borough v. Brewster, 7 N.J. 42, 50 (1951).

While the Legislature did not formally declare in the various statutes that the prohibited actions constitute a nuisance, such a formal declaration is not necessary in order to constitute such acts as a nuisance, 58 Am.Jur. 2d ,

§7, at 577 (1970). Where the Legislature has treated the prohibited acts as a nuisance, it is sufficient. The intention of the Legislature must be determined by the Court. An examination of the 1937 and 1971 Acts and the statements of intent contained therein dictate the conclusion that the act defines a public nuisance as a matter of law.

The State also urges that the defendants have created or maintained a common law nuisance. Thus plaintiff must establish "an unreasonable, unwarranted or unlawful use by a person of his real property which results in a material annoyance, inconvenience or harm to others." Op. of Cherry Hill v. N.J. Racing Commission, 131 N.J. Super. 125 (Law Div. 1974), aff'd 131 N.J. Super. 482 (App. Div. 1974), certif. den. 78 N.J. 135 (1975).

Liability for common law nuisance must be premised upon (1) intentional conduct, (2) negligent conduct, or (3) upon conduct which is so abnormal or out of place as to warrant the imposition of strict liability. 58 Am. Jur. 2d, Nuisances, §1, at 19 (1971).

Intentional conduct as a basis for nuisance liability merits little discussion. Intent, as the term is used in the law of torts, generally does not refer to the fact that the act itself is intentionally or volitionally done. 74 Am. Jur. 2d, Torts §6 (1971). What is meant is that the actor acts for the purpose of causing the invasion of another's

interest or knows that such an invasion is resulting or is substantially likely to result from those acts. Surely Berk and WRCC intended to and volitionally did manufacture mercury compounds and dumped waste on the Velsicol property. However, the court cannot find that the acts were done with the intent to pollute the waters of the State or with the knowledge that such an invasion was substantially certain to occur. No such knowledge or intent may be imputed to defendants under an intentional tort theory.

Nor may liability be premised upon negligence. The State alleges a failure to take necessary precautions as would have been taken by reasonable persons under the same or similar circumstances. The State claims that there was negligence in failing to prevent the pollution, and in failing to correct the situation.

While the discharge of mercury might be considered unreasonable, unwarranted, or unlawful, by today's standards, the actions of the defendants must be measured as of the date they occurred. The standards as to the effluent treatment, even as late as 1974 and 1975 at the time of demolition, did not require any higher degree of care or caution than was taken by them.

The DEP and the EPA had been watching WRCC since the mid 1960's. The effluent being discharged was tested by plaintiff and plaintiff never formally cited WRCC for violations

of any statute nor did it seek judicial relief on the ground that WRCC's conduct violated any standard of reasonable action.

In the late sixties the State requested defendant Ventron and its experts to provide standards to measure mercury discharge to determine acceptable levels. The State cannot now turn and say that the defendants violated their own standards, which defendant in fact made their best efforts to meet.

Thus, the court cannot find that Berk, WRCC, Velsicol or Ventron acted negligently. The conduct of those defendants was reasonable in light of the state of knowledge as it then existed.

Nor can Wolf or Rovic's conduct be considered negligent. Wolf and Rovic, at the insistence of the DEP and EPA, took all reasonable steps to abate the pollution problem. They worked with the Department of Labor, the DEP and the EPA to prepare for demolition. Any escape of water occurred in the presence of government agents who did not complain about what was happening. Their acts were reasonable under the circumstance. Any escape of water was by accident, not by a negligent action.

This determination applies equally to any allegations by plaintiff that it was unreasonable for the defendants Berk, WRCC, Velsicol and Ventron to fail to rectify the discharge and contamination that occurred, regardless of their role in

creating such conditions. Plaintiff argues that those defendants knew or should have known about the problems and that they were negligent in failing to take steps to rectify them. Negligence as a basis for nuisance liability has not been demonstrated. However, strict liability will be imposed upon those defendants.

The diversity of opinion of the experts with respect to the question of whether ground water pollution will ever reach Berrys Creek amazes this court. The State's experts have polluted water flowing freely through voids or leaching. The defendants' experts say no pollution will reach Berrys Creek through groundwater because of the physical and chemical characteristics of the ground and the nature of the mercury.

It is apparent that the overall effect of waste effluent from the plant, surface water runoff and ground water did in fact pollute Berrys Creek. The plant is no longer in operation. Surface water runoff is to be controlled. The question remains, as noted heretofore, whether ground water is now leaching into Berrys Creek containing sufficient mercury as to violate present standards governing Berrys Creek. I need not decide if any mercury has, in the past, reached Berrys Creek via ground water. I choose to do so however, frustrated by the inability to quantify the amount. Obviously, the proofs do not justify a finding that at the present time mercury from ground water alone would pollute a non-polluted Berrys Creek.

I have considered all of the testimony, the statistics and reports, and the information on the effects of the tides, and must come to the conclusion that mercury has reached and may continue to reach Berrys Creek via ground waters. One aspect of the problem was solved, in whole or in part, by the Wolf containment system, but the polluted areas outside that containment system still provide a potential source for further pollution via ground water.

I reject as a matter of law, any contention that pollution in Berrys Creek and the hazards therefrom cannot be charged against those defendants as a public nuisance. One who creates such a nuisance cannot avoid the responsibility therefor by saying that it is not on his land or that the land is no longer his.

Strict liability had its origins in the famous case of Rylands v. Fletcher, L.R., 3. H.L.330(1868). Justice Blackburn, speaking for the Exchequer Chamber stated:

"We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so is prima facie answerable for all the damages which is the natural consequence of its escape."

The courts of New Jersey, while adopting Rylands in principle, appear to have established a standard beyond that required of a reasonable person but short of absolute liability in cases other than blasting operation, storage of explosives and the like, City of Bridgeton v. PB. Oil, Inc., 146 N.J. Super. 169 (Law Div.1976).

284; 178 A.33 (E&A. 1935).

Velsicol argues that it was never involved in any hazardous activity or any activity at all on any of the subject property. It envisions itself as the innocent victim of the pollution.

Velsicol points to the defenses to liability in the 1971 and 1977 Acts to support its position that it cannot be liable. Under those Acts, one is not liable for the discharge caused solely by a third person, act of God or gross negligence.

Ordinarily, a person is not civilly liable for a nuisance caused or promoted by others over whom he has no control, nor is one bound to go to the expense of litigation to abate such a nuisance. Thus, a person is not liable where his property is, by the act of independent third parties, made the instrumentality of a nuisance since their act is the proximate cause. 58 Am.Jur.2d, Nuisances, Sec. 24 at 586-87. (Emphasis supplied) See also 66 CJS Nuisances, Sec. 8(b), p. 743.

Velsicol here not only was in "control" of WRCC from 1960-1968, it was itself a landowner with knowledge. The defendant Velsicol is not an innocent landowner whose property has been victimized by others.

As we become more sensitive to our environment and more aware of the impact of pollution upon the environment, we must demand that the unchecked development of products which release pollutants into our environment be controlled. It does not offend this Court's sensitivities nor infringe upon a manufacturing defendant's constitutional rights to impose strict liability upon a defendant who, during the course of a profit making venture,

discharges into the environment a dangerous or hazardous pollutant, which results in damage or harm to the public, notwithstanding an absence of intent or negligence on the part of the defendant.

In this case it was known by the liable defendants that mercury had dangerous potentialities. It was Berk and WRCC who, as part of this business, sent mercury laden waste effluent into the waters of this State. It is Berk and WRCC who should have to right the wrong and correct the environmental ills. It was Velsicol and Ventron who, for profit were engaged through their subsidiary in this enterprise. They must accept the consequences attendant upon the operation of an enterprise which involved unusual hazards.

The overall situation on the subject properties and in Berrys Creek thus, constitutes a public nuisance. It is logical and just that those liable be prepared to pay for the abatement or containment of that nuisance.

X. CROSS CLAIMS

A close examination what transpired between Ventron and Wolf demonstrates that Ventron knew more than it claims to have known and Ventron must compensate Wolf by way of damages as a result of its failure to disclose those material facts. Nevertheless, Wolf's recovery will be limited by his failure to mitigate damages by recission or otherwise at that point in time (early May) when his knowledge of the facts was as extensive as, or almost as extensive as Ventron's.

Wolf has demonstrated "fraudulent concealment" by clear and convincing evidence. He has shown (1) the existence of a material fact not readily observable to the purchaser; (2) the seller's knowledge of that fact; (3) the seller's intentional failure to disclose that fact; and (4) the buyer's reliance, to his detriment, Weintraub v. Krobatsch, 64 N.J. 445 (1974).

The soil and the waters adjacent to the WRCC plant were contaminated in 1974. This contamination existed in 1968 when Ventron acquired the property from Velsicol. This material fact of gross soil pollution was not readily observable to the purchaser. Even Wolf's soil engineers did not discover the soil pollution. True, they were not looking for soil pollution, but if the pollution had been obvious, surely the Joseph Ward and Co. engineers, would have discovered it in the course of their test borings, (which were taken only to determine bearing capacity, moisture and construction feasibility).

Long prior to Wolf's involvement, WRCC/Ventron had commissioned experts to devise a plan for the safe disposition of the waste in order to minimize environment contamination. In 1970, Ventron undertook to make accurate measurements of the discharge of mercury. The results of this measurement showed that the total discharge greatly exceeded the unrecovered mercury whose discharge was a by-product of the production process. A substantial quantity of "residual Mercury" was finding its way into the water runoff. What was happening was that the underground piping system was picking up mercury from the contaminated soil and discharging it at the outfall; i.e., the final point of measurement.

In 1972, Ventron commissioned Metcalf and Eddy to analyze samples of soil and ground water. The analysis showed severe contamination in the wastewater decreased, but the mercury remained in the soil. The seller had "knowledge".

Ventron, in failing to fully disclose these facts, intentionally concealed the presence of this latent danger from Wolf. The Court can draw only one inference from Ventron's decision to send Wolf the boring report of Craig Testing Laboratory while omitting the Metcalf and Eddy data. Perhaps if Wolf had seen the Metcalf and Eddy data, he might have discovered the contamination earlier and chosen to reject the contract. Ventron's alleged disclosure to the McCarter and English attorney who represented both Wolf and Ventron in the transaction has not been proven, particularly in the face of the attorney's unequivocal denial.

Ventron argues that Wolf did not rely on any non-disclosure. It is Ventron's position that Wolf undertook his own investigation of the property, using independent soil engineers. Ventron suggests that even if that Court finds reliance, it should find that such reliance is unreasonable. Ventron argues that Wolf knew he was buying property upon which mercury products had been manufactured, and, hence, his failure to make his own investigation into matters of soil contamination was unreasonable.

Ventron relies on the doctrine of caveat emptor, as stated in Levy v. C.Young Construction Co., Inc., 46 N.J.Super. 293 (App. Div. 1957, aff'd 26 N.J. 330 (1958)). The Appellate Division there held that the "prevailing law throughout the country" negates the existence of any implied warranties connected with a sale of real estate, obligating the seller only insofar

as warranties are expressly stated in the deed. Levy, supra., 46 N.J.Super. at 296. The Appellate Division found no evidence of knowledge of the defect and held that there are no implied warranties, even in the sale of new housing (which was the state of the law in 1957). The Supreme Court, however, declined to rule upon the rule of no implied warranties. Levy, supra., 26 N.J. 334.

The point to be emphasized is the finding of an absence of full knowledge on the part of the seller. Where there is knowledge of latent defects, the caveat emptor doctrine generally will not be applied. Weintraub v. Krobatsch, 64 N.J. 445 (1974); Papon v. Hackensack Auto Sales, Inc., 63 N.J.Super. 446 (App.Div. 1960).

Ventron, however, claims that under the facts of this case, the doctrine is nonetheless applicable:

"Courts do not aid a purchaser of real estate who is carelessly indifferent to the use of ordinary caution before entering into a contract, when he is left free and uninfluenced to make examination of the property and to exercise his own judgment in determining whether or not to buy.

The doctrine of caveat emptor is applicable . . . "Freedman v. Vensico Realty Co., 99 N.J. Eq. 115, 118 (Ch.1926).

Ventron charges Wolf with careless indifference. The facts do not justify that conclusion. While greater caution may have been required of Wolf that the average layman because of his special knowledge of real estate matters, he acted with all due caution that was required. See National Premium Budget Plan Corp. v. National Fire Insurance Company, 97 N.J. Super. 149,211 (Law Div. 1969).

Ventron could have, and should have at least advised Wolf of the governmental "red-tape" it was encountering and what might be in store as Wolf tried to develop the property. Velsicol advised Ventron at least through its warranty disclaimer. Ventron knew of Wolf's goals. Under these facts, Ventron cannot escape liability by arguing caveat emptor.

Wolf's statement is significant:

"contemporary standards of fair business dealings particularly with respect to environmental problems impose a duty on a chemical company with particular knowledge of the contamination of its soil and the relationship between itself and environmental authorities to disclose to potential purchasers the full ramifications of the conditions it created and maintained. To require less is to license deception. (Wolf's Trial Brief at p.13).

Under the circumstances, it was not unreasonable for Wolf to rely on Ventron to the extent that he did, even though the fact of pollution was of record. An extensive search of EPA files was not required of Wolf. He will not in this case be penalized for his expectation of fair dealing.

Of greater significance is the policy statement set forth by the New Jersey Supreme Court in Schipper v. Levitt & Sons, 44 N.J. 70 (1965). Although the Court there limited its discussion of implied warranty in realty law to the sale of new homes, a search of the cases indicates that the Supreme Court has never precluded extension of the doctrine to all sales of realty.

The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected . . . Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

Perhaps warranties should be implied in all sales of realty. Perhaps the seller of land, even without knowledge, should be held to have impliedly warranted the fitness of the land for the purpose intended. Those states which have adopted the Uniform Land Transaction Act, are carrying out the sound policy statement of the New Jersey Supreme Court as express in Schipper. The Uniform Act, which parallels the Uniform Commercial Code creates express warranties of conformance from affirmations of fact which form the basis of the bargain. 77 Am.Jur. Vendor: Purchaser §329. (Supp. 1978).

This Court need not determine whether the law should imply warranties in all sales of realty. Yet, Wolf could have made a good argument. Logic, fairness, and the absence of justification for distinctions between personalty and realty would, at least under these facts, have justified an implied warranty of fitness, had Ventron been ignorant of the facts.

Nevertheless, Wolf's expertise and profit motivation will preclude any accrual of damages on the fraud claim after he knew, or should have known, the non-disclosed facts. At that point in time, Wolf could have rescinded. He may not, under the circumstances here choose not to rescind, and to thus burden Ventron with additional consequential damages. Wolf chose to retain the land. Damages must be limited to adjustment of the purchase price to provide Wolf with the land in the condition that he bargained for. This may be accomplished by the recovery of the actual costs of the containment system and other cost incurred in abating the

pollution to the satisfaction of the EPA, including the added costs of the containment system and other cost incurred by Rovic. These costs were actually incurred and the responsibility is Ventron's.

Wolf may not recover damages in the nature of potential loss of profits on resale based on the diminution in value or due to possible restrictions or liens on the land. Such damages were waived by his decision to proceed.

In addition, Ventron must bear some responsibility by virtue of the deed covenant which provided that it had not done any act:

. . . by means whereof the premises conveyed here or any part thereof, now or at any time hereafter, will or may be charged or encumbered in any manner or way whatsoever.

One of the elements of such a covenant is that the purchaser does not contract for a title which will require him to defend a suit in order to protect his right to the use and enjoyment of his property. See 8A Thompson, Real Property 4482 (1963 Ed). Ventron is liable to Wolf for the costs of suit and for counsel fees.

Ventron, however, is correct in its argument that the covenant is not such a covenant as would create an express warranty as to quality. There was no such express warranty given by Ventron.

Rovic cannot recover directly except insofar as Rovic may recover for the added costs of work done on demolition and containment at the insistence of the DEP. Wolf/Rovic will be made whole. The unique circumstances of this case require that Ventron

be responsible at least to this extent for the damages its actions cause Rovic, but consequential damages may not be recovered on Rovic's fraud or covenant claims in the absence of privity of contract. Rovic has not demonstrated that any duty was owed it by Ventron, nor that Ventron intended that Rovic rely on any of its action or omissions. Neither has Rovic shown that it was a third party beneficiary of the Ventron-Wolf transaction contract or deed covenant.

Rovic argues that since Ventron knew of Wolf's plan to demolish the buildings and to build new structures and knew that Rovic would be the general contractor, it was foreseeable that Rovic might be harmed by the groundwater and subsoil mercury conditions. This argument also must fail.

Rovic's recovery is then to be vicarious. Wolf and Rovic are "one" and thus Wolf/Rovic must be made whole.

REMEDY

Much of the difficulty heretofore was the result of lack of assurance on the part of the State as to the steps to be taken. It is not sufficient (nor logical) for the State to order defendant to abate a nuisance or clean up a polluted area where the parties differ as to what must be done. The State apparently does not want to take the responsibility of living with its own choice. The State's position has been to say to defendants, in effect - you clean it up and when you're done you will be responsible to see that you've accomplished a result. In essence, the State seeks a judgment requiring the defendants to bear the burden of clean up as well as the responsibility for subsequent expenses should the measures taken prove inadequate.

This court will not permit the State to assert such a position. The State must take the lead. The Court will order the State to act. The clean up of Berrys Creek will proceed. The rational and logical approach is that the Berrys Creek clean up cost, be it by dredging or otherwise, be borne initially and equally by Velsicol and Ventron. They are severally liable. They acted separately and independently. In such case there is no joint liability. 74 Am Jur 2d § 63 (1971). The State is to prepare and present a plan for clean up within 60 days after judgment is entered. The liable defendants will have 30 days thereafter to serve and file reply papers as to the viability of that plan. Thereafter the Court will, after argument, finalize the plan. No plenary hearing will be required.

Velsicol similarly will, within 60 days from judgment, present a plan for surfacing or blacktopping the Velsicol tract to

prevent surface water runoff. That responsibility must be Velsicol's. The plan may be, in whole or in part, part of a general development approach. It shall include a timetable and cost estimates. Here the State will have 30 days to comment on the efficacy of the proposed plan and here again the Court will rule after argument.

The Court will not now require entombment of the entire Velsicol tract. The preponderance of the evidence does not demonstrate that there is present leaching of ground water, nor is there proof that such leaching would create in a dredged Berrys Creek a hazardous condition.

This Court must eventually determine if the combination of the existing Wolf containment system, the dredged Berrys Creek and the surfacing of the Velsicol property suffice to control the situation in the future. Is there such ground water leaching into Berrys Creek as would violate the standards now existant and create a hazardous condition requiring further action at the expense of the liable defendants by way of entombment or otherwise?

When the surfacing of the Velsicol property and the clean up of Berrys Creek are completed, the monitoring may begin, to see if mercury is leaching into the creek and in what amounts. If leaching is taking place now, it has been taking place during all these years and one year of checking after the clean up of Berrys Creek and the surfacing of the Velsicol land will suffice to make the determinations required. The State may, during that year monitor as it deems appropriate to determine the efficiency of the surface cover and the amount of leaching then occurring and provide proof

of its claim that a further remedy by way of entombment of the entire tract is otherwise required.

The cost of monitoring, however, must be initially borne by the State. The State has heretofore failed to prove its case as to present leaching. If it seeks to prove such leaching, the burden is upon it: The State or the Fund will initially serve as the source of financing such monitoring.

N.J.S.A. 58:10-23.11 o (3) provides that monies in the Spill Compensation Fund be disbursed .

"...as may be necessary for research on the prevention and effects of spills of hazardous substances on the Marine environment and the development of improved cleanup and removal operations as may be appropriate by the Legislature; provided, however, that such sum shall not exceed the amount of interest which is credited to the fund."

The oil companies argue that monitoring may not be paid for from Fund monies as monitoring is (1) not "research" and (2) there has been no appropriation. They also argue that any sums could not exceed the amount of interest which is credited to the Fund which would undoubtedly not cover monitoring costs.

However, the Court views monitoring costs as being separate and apart from N.J.S.A. 58:10-23.11 o (3). Monitoring in the situation before the Court is part and parcel of the abatement of spills and discharges as to which the State must act and for which the Fund is strictly liable. The State and/or the Fund must initially bear this burden.

If, in fact, the Court determines that there is leaching which will create a violation of the standards now existant, the liable defendants may be charged with all or part of the monitoring costs.

But there must be a limit to ultimate liability and the Court intends to now set that limit within the framework of all of the proof before it.

Ventron is liable to Wolf/Rovic. Velsicol must surface its land; the liable defendants must cover the costs of cleaning up Berrys Creek. These amounts may be determined with some specificity now, and judgments will serve as the remedy afforded. How then, to provide security if the necessity of further action, is shown? - i.e., the costs of entombment and/or monitoring?

As security for entombment and/or monitoring costs, and as a condition to release from further liability and as a condition to release of the Velsicol land from any liens or restrictions on transfer, Ventron and Velsicol will be required to post security to assure payment for any procedures which may prove to be necessary should the monitoring system indicate that there is present ^{actionable} leaching or leakage which is reaching or may reach Berrys Creek.

The bond or cash security required from Ventron and Velsicol will be determined within the next few weeks after the Court re-examines the initial damage claim of the State, and adjusts that sum considering (a) this opinion, (B) the Wolf containment system cost, (c) the fact that Berrys Creek will be dredged at the expense of defendants, (d) the fact that the Wolf land is now surfaced (or will be surfaced), (e) the fact that Velsicol will, at its own expense, surface (or develop so as to prevent polluted surface water reaching Berrys Creek) its 33 acres and (f) any suggestions by the attorneys for the State, Velsicol and Ventron based upon proof before me. As the Court views the present posture of the

case, the maximum liability, if any, that might be imposed on Velsicol and Ventron could be \$1,000,000. each.

The limits of liability of the liable defendants having thus been determined, this is now principally a matter of the protection of the public by the State.

The State is not merely an innocent party. The DEP could have and should have closed down the plant as early as 1968. Its inaction in the years subsequent to 1968 must relieve the liable defendants of some of the burden and responsibility. Yet, in so doing, the public must be protected.

The clean up of Berrys Creek, the surfacing of the Velsicol tract, the monitoring and possible, future entombment, together with the escrowed monies will provide the necessary protection. Beyond that, the Legislative Scheme mandates that the Spill Compensation Fund be utilized to protect the environment and the public.

If at the end of the year of monitoring, no present leaching is reaching Berrys Creek in such amounts as would violate present standards and create a dangerous situation, Velsicol and Ventron will be entitled unconditionally to the return of the escrow monies and/or the release of sureties.

In the final analysis, the State is getting more in terms of dollars than it proposed initially. The costs of the clean up and surfacing together with the monies in escrow undoubtedly exceed \$4,000,000. The State's estimated costs of all actual procedures was less than this - approximately \$3,000,000. This result is not unfair.

The public must be protected. The State is meeting its obligation to provide for the health, safety and welfare of the people of this State. It will take the corrective steps required at the expense of the liable defendants. It will monitor at the initial expense of the Spill Fund. It will correct such hazards as the monitoring exposes and correct them at the expense of the liable defendants.

The Court retains jurisdiction to effectuate the purposes and intent of this opinion. If Wolf/Rovic and Ventron cannot agree on the quantum of damages, the Court will set the ground rules for the determination of the same.

Submit an appropriate form of final judgment.



Sen. Bill Bradley makes a point during Wood-Ridge meeting. Politicians and scientists gathered to discuss meadowlands mercury contamination.

Staff photo by Peter Monsees

Meadowlands mercury peril disputed

By Bret Israel
Staff Writer

Scientists want answers; politicians, results

A panel of scientists faced a battery of politicians yesterday to discuss what to do about 300 tons of mercury polluting the Hackensack Meadowlands in what is probably the most contaminated such site in the world.

The scientists told the politicians there is no "imminent, immediate, direct" health threat. The politicians, for the most part, told the scientists to quit stalling.

The massive concentration of mercury was discovered in 1974 after the former Wood-Ridge Chemical Co. closed its mercury-processing plant at the headwaters of Berry's Creek on the Wood-Ridge-Carlstadt border. The state Department of Environmental Protection (DEP) is in court trying to force six pre-

sent and former owners of the 40-acre site to help share the costs of removing or containing the toxic metal.

Yesterday's session represented the first time in the five years since the contamination was found that borough, county, state, and federal officials got together to review what is being done to avert an environmental disaster.

Speaking what sometimes sounded like different languages — with the environment experts urging caution, and most of the politicians pressing for an immediate solution — the officials agreed in the end to set up an intergovernmental panel to review findings coming from the site.

"A series of poisoned spots and cancer clusters exist in Bergen County today, whether we like to admit them or not," Wood-Ridge Mayor Peter Incardone told the group as fewer than 50 borough residents quietly listened in the municipal building. "It is becoming more apparent each day that local and county governments possess neither the expertise nor financing to cope with these things."

Won't support it

Daniel O'Hern, the state environmental commissioner, told borough officials that he would not support a measure introduced in the legislature to appro-

priate the \$4 million needed to clean up the site. He said he preferred to recoup the costs from the former operators of the plant.

He and Dr. Richard Dewling, deputy regional administrator of the United States Environmental Protection Agency, acknowledged that even if they had the funds, they aren't certain of the best way to contain the contamination — whether to entomb it in concrete or cart it away.

"Our conclusion is that there is no imminent, immediate, direct threat to the people in this area, simply because the mercury is in a form and in a place

where people are not exposed," said Dr. Glenn Paulson, an assistant environmental commissioner, at the end of a clipped, 20-minute recitation of the scientific findings.

"Our concern is that at some time the mercury may begin to move into creatures and then provide an exposure route into humans," Dr. Paulson said.

"There is clearly a potential threat over some period of time that we cannot now judge. All our actions have been taken toward the end of keeping that threat a potential one — not an actual or imminent one."

Skeptical Bergen legislators, nevertheless, promised to press their efforts to quickly free monies for the cleanup, and Sen. Bill Bradley and Rep. Andrew

See MERCURY, Page A-24

Mercury danger in meadowlands is disputed

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Maguire said they would look into getting federal funds.

"We're just getting courtroom answers," Assemblyman Robert Burns, a Hasbrouck Heights Democrat, said after listening to O'Hern and Dr. Paulson. "Damn the cost — let's remove it as quickly as possible before half of Bergen County is as mad as a hatter due to mercury poisoning."

Maguire, like Bradley, urged a more cautious approach. He observed: "One bad thing would be to rush in tomorrow with shovels to spread the stuff around."

But state Sen. Anthony Scardino Jr., a Lyndhurst Democrat, said: "One word bothers me in all this — and the word is potential. As long as there is a potential, we should move expeditiously to clean up the matter as though it is an ecological time bomb." A phrase scientists have used in testimony at the state trial.

"You're all from outside Wood-Ridge. I'm from Wood-Ridge," Councilman Paul Calogino said. "I appreciate your coming here, but you have to realize the problem for us is right now. There are hunters down there; kids play stickball there."

"I used to be the mayor of a small town. What happens if you have a fire, buildings are boarded up, and pose a danger?" Commissioner O'Hern said, trying to reassure borough officials.

"You don't go in immediately to tear out everything the day after a fire; you go through a process of trying to resolve it. That's what the state is doing."

"Let's not draw wild analogies," replied Assemblyman Paul J. Contillo, a Paramus Democrat, who said he thought he was being "waltzed around."

"Our philosophy is very clear," Dr. Paulson of the DEP said. "If we find signs of mercury moving toward people in significant quantities, we will stop it before it gets to people."

Apologizing for speaking in scientific language, Dr. Paulson said that the extraordinarily high levels of the chemical on the site of the former plant were "at levels higher than in a mercury mine."

But Dr. Paulson challenged the conclusion of another researcher that the mercury is slowly beginning to pollute the air over the meadowlands.

At least one case of mercury poisoning involving a former plant worker has been reported, but state officials have seen no reports of people who didn't work at the site being affected, Dr. Paulson said.

But Dr. Paulson cited the mercury poisoning in the Japanese fishing village of Minamata, where more than 100 people died and thousands were left deformed. He said that symptoms of mercury poisoning did not show until more than a year after residents ate poisoned fish.

Tests on fish in the meadowlands, he said, failed to show mercury contamination at levels higher than elsewhere.

Governor Byrne on Friday directed Attorney-General John Degnan to try to speed a decision in the legal case against the former owners of the meadowlands mercury plant. After months of hearings, such as

Rutherford sniffs the air to uncover cause of cancers

FROM PAGE A-23

However, investigators concluded that none of the carcinogens was present in great enough quantity to be responsible for the abnormally high blood cancer rate.

But these new tests will measure 20 hydrocarbons rather than 10, and also will collect particles in the air. The tests will be carried out for a year, rather than just a few weeks, and investigators will be able to compare the Rutherford data with that collected at five other locations.

Although Rutherford was not originally selected as a testing site, Dr. Sidney Gray of the DEP explained that environmental officials changed their minds after the cancer cluster came to light last spring. "We were going to do some sampling in North Jersey anyway, and decided we might as well do it in Rutherford," he said.

Best we've got

"Those kids got zapped by something. We're proceeding on the assumption that there is an environmental cause. That hypothesis may not be correct, but it's the best we've got."

Although health and environment officials have said that it is unlikely a cause will be found, Dr. Gray said last week that the opportunity to use the cluster as a field laboratory is invaluable. "We're going to keep looking," he said, "and maybe 15 or 20 years from now people will say, 'Hey, those guys in New Jersey were on the right track.'"

Two problems have plagued researchers trying to pinpoint a cause of the Rutherford cancer cluster.

Scientists still do not fully understand why leukemia develops, and they know little about the combined effect of low-level carcinogens.

For example, scientists know that benzene is carcinogenic at levels above 10 parts per million. They don't know if low-level exposures, such as the one part per billion measured in Rutherford,

combined with other carcinogens such as radiation or heavy metals, also result in leukemia.

This time around, researchers hope to get some clues about the synergistic (or combined) effect of chemicals by exposing a certain strain of bacteria to the particles collected by the high-volume, hat-shaped filter.

The test was developed by Dr. Bruce Ames of the University of California. If the bacteria mutate, it is assumed that the chemicals or combination of chemicals will cause cancer in humans.

But, said Henry C. McCafferty, Rutherford's health officer, "Even if the Ames test is positive, then they'll have to figure out what in the sample is responsible."

Other plans

Other investigations are planned in Rutherford. A DEP staffer will conduct an extensive survey of residents to put together an "environmental history" of the borough. Radiation tests are planned. And a group from Rutgers plans to develop a computer program to track pollutants spewed out by factories to determine what neighborhoods are most affected by airborne carcinogens.

Although the television cameras and newsmen who focused national attention on the cancer cluster are long gone, the people of the borough haven't forgotten their health problem.

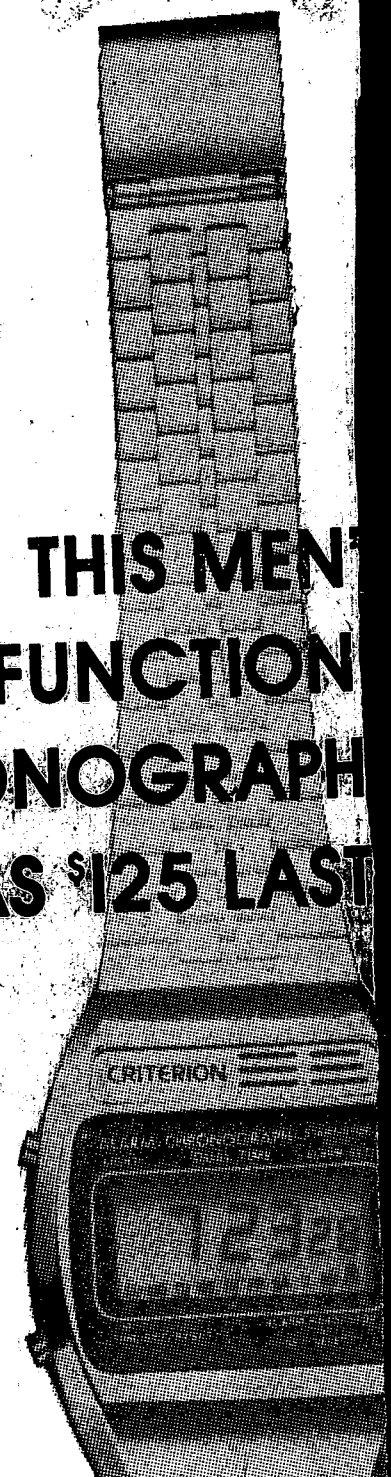
The board of health is pressing the state to update its list of victims, says McCafferty, the borough health officer. He adds that he knows of one new case of Hodgkin's disease since the state last counted.

"We don't even have the list of names, so when we hear of a case we don't know if it has been counted or not," he said.

And six residents will give up hours of their time to find out what is in the air their neighbors breathe.

When asked why she was doing it, one woman replied, "We want to know what's out there. If it's nothing, fine. If there is something, we want to find it before more people get sick."

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2-Way Memo

Subject:

(Venture)

To :



Barbara Metzger.

Thru Fred Rubel.

(FR)

INSTRUCTIONS

Use routing symbols whenever possible.

SENDER (Originator of message):

Use brief, informal language.

Conserve space.

Forward original and one copy.

RECEIVER (Replier to message):

Reply below the message; keep one copy, return one copy.

DATE OF MESSAGE

ROUTING SYMBOL

10/26

SIGNATURE OF ORIGINATOR

M. P. Photo

TITLE OF ORIGINATOR

FOLD

INITIAL MESSAGE

FOLD

John Zammit of the Corps of Engineers advises that in March & April of 1978 Mr Dewling and he were involved with the State on dredging. He says that Dick Dewling went along with no dredging as best EPA policy - which is consistent with what Dewling told me - no dredging.

1. WHAT is current management position - to dredge or not to dredge?

REPLY MESSAGE

He also says that there were a series of analogous dredging meeting with PCB's and the decision to dredge as best solution has not been finalized.

* Maelvry in Bereys Creek.

From :

DATE OF REPLY

ROUTING SYMBOL

SIGNATURE OF REPLIER

TITLE OF REPLIER

2-Way Memo

Subject:

Ventron

From :

Barbara Metzger.

Thru Fred Rubel. (FR)

INSTRUCTIONS

Use routing symbols whenever possible.

SENDER (Originator of message):

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Forward original and one copy.

RECEIVER (Replier to message):

Reply below the message; keep one copy, return one copy.

DATE OF MESSAGE

ROUTING SYMBOL

10/26

SIGNATURE OF ORIGINATOR

Barbara Metzger

TITLE OF ORIGINATOR

FOLD

INITIAL MESSAGE

John Zammit of the Corps of Engineers advises that in March & April of 1978 Mr Dewling and he were involved with the State on dredging. He says that Dick Dewling went along with no dredging as best EPA policy - which is consistent with what Dewling told me - no dredging.

1. WHAT IS CURRENT management position - to dredge or not to dredge?

REPLY MESSAGE

He also says that there were a series of analogous dredging meeting with PCB's and the decision to dredge as best solution has not been finalized.

* Marbury in Berreys Creek.

To :



DATE OF REPLY

ROUTING SYMBOL

SIGNATURE OF REPLIER

TITLE OF REPLIER

December 6, 1979

Mr. Chet Mattson
Hackensack Meadowlands Development
Commission
100 Meadowland Parkway
Secaucus, New Jersey 07094

Dear Chet:

As was discussed during the Federal Resource meeting with the State of New Jersey, at which Paul Galluzzi represented the Meadowlands, I have obtained the Health Assessment of air-borne mercury measured in Wood-ridge, New Jersey, approximately one year ago.

Attached please find this assessment performed by Mr. Merenda of the Toxic Substances Assessment Division, EPA, Washington, DC.

I have already supplied copies of this assessment to Dave Lipsky of the New Jersey Department of Environmental Conservation's Commissioner's Office and Ron Heksch, Deputy Attorney General, State of New Jersey. It should be helpful in their appeal which Mr. Heksch said would be filed.

Sincerely yours,

Michael V. Polito
Emergency Response & Hazardous Materials
Inspection Branch

Attachment

BCC: F.N. Rubel ✓

2-SA-ERHMIB:MVPolito:jkw:Bldg.209:X6652

ERHMIB	ERHMIB
POLITO	RUBEL

Good
Rubel -

File put in Room
as per mte

MEMORANDUM OF CALL

TO: _____

☐ YOU WERE CALLED BY— ☐ YOU WERE VISITED BY—

OF (Organization) _____

☐ PLEASE CALL → PHONE NO. _____ ☐ FTS
CODE/EXT. _____
☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU
☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE _____

RECEIVED BY _____

DATE _____

TIME _____

63-109

☆ U. S. GPO:1977-0-241-530/3210

STANDARD FORM 63 (Rev. 8-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.6

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Copy to me
Mason

DATE: January 28, 1980

SUBJECT: Response to Freedom of Information Request RIN-1013 With Respect to Mercury-Related Environmental Problems at Former Site of Wood-Ridge Chemical Corporation (Ventron Site, Wood Ridge, N.J.)

FROM: Henry Gluckstern *LL9*
Attorney
Water Enforcement Branch
TO: Barbara Metzger
Director
Surveillance and Analysis Division *did*

Paul > Blot
Spear
Buzsach

1/11/80
1615 hrs.
2/4/80
0800
1 *Kubel*
2 *Polito*
3 *Rabel*
3 *F.R.*

The enclosed Freedom of Information Request was received by this Division on January 21, 1980. As a result, I transmitted to the requestor my letter of January 25, 1980, of which you have been provided a copy, enclosing a duplicate of the files currently in my possession relating to the Ventron site along Berrys Creek. I have also recalled from the NARS Bayonne terminal the Permits Administration Branch file relating to this former effluent source.

Michael Polito informs me that there may exist as many as three additional files relating to mercury contamination of Berrys Creek and/or the former Ventron site. I have been appointed coordinator of the Regional response to this request. I am hereby requesting that you forward this request to appropriate branches of your Division, requesting branch chiefs to locate and reproduce whatever files pertaining to the subjects of mercury pollution in Berrys Creek, discharges from the former Ventron site, or monitoring in the Berrys Creek area in the vicinity of the Ventron site may exist in your Division. The reproduced files should be forwarded to me for further processing in connection with the above-referenced FOI request.

I am aware of the burden that responding to this request may place on your already overworked staff. Nevertheless, I would appreciate whatever assistance you can provide to minimize the response time involved.

Enclosure

cc: Freedom of Information Officer
EPA Region II

Please get all info together in the Conference room between Rich & Fran's office - I am working with Herman to figure out how to get it copied.
Barf

RECEIVED

JAN 29

Director, S&A Division

RECEIVED

RECEIVED

FEB 1 1980

11/5

Fred-

I called Barbara Metzger as you asked and briefed her on the meeting with the State of New Jersey and the Federal Resource Agencies. In the conversation Dr. Metzger stated that your "experts" would have a role in the mercury problem (she was referring to persons other than me.)

I should have had a clear understanding of the meaning of the "expert" resource and role, but it slipped by me and was remembered during reflection.

I would ask that you contact Barbara
and obtain a better explanation and a
coordinator, keep me advised. I would
appreciate this being done as soon as possible,
so if necessary I can advise New Jersey of these
"experts" and how they can help.

Copy sent

11/5

To: John Ciarcia
From: Mike Polito
Subject: Mercury Monitoring - Ventum.

As per my conversation with Barbara Metzger this date, you have been identified to me by Barbara as the person who will advise on monitoring needs at the Ventum site and surrounding areas in the Woodbridge N.J. - EPT Region II.

After the conversation with Barbara I held a meeting with you and briefed you on the N.J. Contactor, an overview of the mercury contamination in the Woodbridge site and adjacent Meadowlands.

In order to assist you I can help in setting up coordinating informational meetings with the N.J. D.E.P. and provide you with any other information I have available. A meeting with N.J. D.E.P. quite shortly most probably would be most helpful.

P 142

What I see as needs in assessing and monitoring the emanation of mercury from the Ventron site and its effect on Berazo Creek is at least the following.

- 1) A recommendation as to monitoring techniques to be employed for instance
 - a) radioactive tracers
 - b) site wells.
 - c) stream sampling.
- 2) The best location of sampling points.
- 3) The frequency and times of sampling
- 4) A sampling quality control program
- 5) An interpretation of sampling results.
- 6) Specifics as to implementation of sampling techniques.

Any other information you may have available.

Cc. B. Metzger.

F. Rubel

R. Spear.

p 20/2

ROUTING AND TRANSMITTAL SLIP

Date

1/31/80

TO: (Name, office symbol, room number,
building, Agency/Post)

Initials

Date

1.

B. Metzger

2.

3.

4.

5.

Action

File

Note and Return

Approval

For Clearance

Per Conversation

☒ As Requested

For Correction

Prepare Reply

Circulate

For Your Information

See Me

Comment

Investigate

Signature

Coordination

Justify

REMARKS

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)

Room No.—Bldg.

F. Rubel

Phone No.

fred

1/30/80

~~Ditto~~ - Please advise
on thickness (inches) of
our version. Tell =

Barbara wants to know
this ~~to~~ + we are not
to undertake copying until
she approves

~~fred~~

fred

① About 4" thick - hand file

2-Way Memo

Subject :

Ventron

To :



File Ventron

INSTRUCTIONS

Use routing symbols whenever possible.

SENDER:

Use brief, informal language.
Conserve space.
Forward original and one copy.

RECEIVER:

Reply below the message, keep one copy, return one copy.

DATE OF MESSAGE

Routing Symbol

10/17/79

SIGNATURE OF ORIGINATOR

Mike Polito

TITLE OF ORIGINATOR

FOLD

INITIAL MESSAGE

On this date in arranging a meeting with personnel identified by B.M. thru F. Rubel I contacted John Zornit of the Corps of Engineers. John advised:

1) He had some frustration with the state as they don't know what they want.

2) They want others to do their work.

3) Dr. Paulson had at a dredging meeting which John Zornit attended with Dr. Dewhag had said the best approach was to leave the meadow in Berry's Creek in place. EPA (Dewhag agreed).

4) There have been at least 4 meetings on this entire subject the past year, the latest being October 13, in which the material the state wants covered has been covered.

REPLY MESSAGE

5) Dennis Soskowsky would be COE contact.

6) State has not made permit application

7) Feels too dry timetable to initiate dredging too quick.

I also contacted - Joe Hlodak, EPA, Pat Anderson, EPA (Charlie Kulp - The Wildlife, Stan Earsky NOAA. Don Lipky out on vacation N.J. D.P.A. - till the end of the week.

Zornit also commented on emergency and Lipky's vacation.

I wrote letter to ~~F. Rubel~~ F. Rubel in EPA dredging policy - situation analogous to Hudson River D.C.B.

From :

C.C. F. Rubel (action as necessary)

DATE OF REPLY

Routing Symbol

SIGNATURE OF REPLIER

TITLE OF REPLIER

2-Way Memo

Subject :

Ventreon-

To :



File-

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Routing Symbol

10/19/79

SIGNATURE OF ORIGINATOR

[Signature]

TITLE OF ORIGINATOR

FOLD

INITIAL MESSAGE

Fred Rubel stopped in and advised that he spoke to Dewling on policy for dredging at Ventreon site. He (Dewling) told Rubel that I should speak to Pete Anderson, Pete is in Tokyo.

C-C. MOP File

REPLY MESSAGE

Info copy - Fred. Correct if not right.

Also told Mike that if he did not have an answer, I would attempt to help him with this. On 10/25 Mike advised of above while we were coincidentally in men's room --- but also explained that he asked Barbara ~~about Barbara~~ what our position would be.

From :

DATE OF REPLY

Routing Symbol

SIGNATURE OF REPLIER

TITLE OF REPLIER



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
EDISON, NEW JERSEY 08817

October 18, 1979

Dr. David Lipsky
Office of the Commissioner
New Jersey Department of
Environmental Protection
P. O. Box 1390
Trenton, New Jersey 08625

Dear Dave,

In the past, Region II of the U. S. Environmental Protection Agency identified experts in the scientific areas addressed in former Commissioner David Bardin's letter of April 1, 1977 to former Regional Administrator Gerald Hansler. These experts were:

Dr. James Ryan, Soil Chemist
Industrial Environmental
Research Center
U. S. EPA
555 Ridge Avenue
Cincinnati, Ohio 45268
513-684-7653

Dr. Robert Tardiff, Toxicologist
Industrial Environmental
Research Center
U. S. EPA
555 Ridge Avenue
Cincinnati, Ohio 45268
513-684-7213

Mr. Thomas Newport, Hydrologist
Industrial Environmental
Research Center
U. S. EPA
555 Ridge Avenue
Cincinnati, Ohio 45268
513-684-4417

Mr. Ronald Eisler, Estuarine Aquatics
Industrial Environmental
Research Center
U. S. EPA
South Ferry Road
Narragansett, Rhode Island 02882
401-789-1071

Dr. Robert Rogers, Mercury Methylation-Soils
Office of Research and Development
Environmental Monitoring & Support Laboratory
U. S. EPA
P. O. Box 15027
Las Vegas, Nevada 89114
702-736-2969

These experts were made available and did issue reports for NJDEP, copies of which should be in your files.

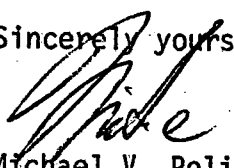
If there is again a need for their expertise, please contact them directly to determine availability and funding arrangements if visits to New Jersey are required.

In any case, Region II, through me, must be kept appraised of their involvement and activities.

Dr. Mason has also separately provided you with a list of dredging experts, per your request.

I do hope this list proves helpful.

Sincerely yours,



Michael V. Polito
Emergency Response &
Inspection Branch

cc: Dr. Sid Gray
Mr. R. Eisler
Dr. R. Mason
Dr. B. Metzger
Mr. T. Newport
Dr. R. Rogers
Mr. F. Rubel
Dr. J. Ryan
Dr. R. Tardiff

2-Way Memo

Subject :

Ventron

To :



Fred Rubel

INSTRUCTIONS

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Conserve space.
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RECEIVER:

Reply below the message, keep one
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DATE OF MESSAGE

10/4/79

Routing Symbol

SIGNATURE OF ORIGINATOR

Michael W. Pelts

TITLE OF ORIGINATOR

Chemist

FOLD →

INITIAL MESSAGE

DAVE Lipsky called from N.Y.D.C.P. He wanted the
following information from EPA?

- 1) Alternatives to dredging Rarities Creek?
- 2) Funding assistance in the Ventron Project?
- 3) Is EPA going to act as Lead Federal Agency
to conduct Federal actions surrounding future activities and
how will this be accomplished?

It would appreciate receiving funding and coordination. Should
the S.S.C. be employed yes, how, why?
Do you have any information on dredging, who knows etc.

REPLY MESSAGE

From :

DATE OF REPLY

Routing Symbol

SIGNATURE OF REPLIER

TITLE OF REPLIER

10/4/

1) Should there be a regional group to assist on Pension?

2) Should we review all items re. funding + dredging

what if we get more structured

2-Way Memo

Subject :

Venturon

From :

Fred Rubel

INSTRUCTIONS

Use routing symbols whenever possible.

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Use brief, informal language.
Conserve space:
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Reply below the message, keep one
copy, return one copy.

DATE OF MESSAGE

10/4/79

Routing Symbol

SIGNATURE OF ORIGINATOR

TITLE OF ORIGINATOR

Chenest

FOLD

INITIAL MESSAGE

Dave Lipsky called from N.Y.D.O.P. He wanted the
following information from EPA:

- 1) Alternatives to dredging Kings Creek?
- 2) Funding assistance in the Venturon Project?
- 3) Is EPA going to act as lead Federal Agency
to conduct Federal actions surrounding future activities and
how well they be accomplished.

I would appreciate receiving funding and correlation. Should
the S.S.C. be employed yes, how, why?
Do you have any information on dredging, who knows etc.

REPLY MESSAGE

To :



417-1567

DATE OF REPLY

Routing Symbol

SIGNATURE OF REPLIER

TITLE OF REPLIER



For Continuation of Routes See Reverse Side.

1-5	125. St. Peter's College	F-9	27A. Triborough Stadium	E-11	27. Yonkers Hospital	B-12	6C. Colonia C. C.	H-4	70. *Green Pond G. C.	G-4	108. Mountain Ridge G. C.
G-9	135. St. Vincent's Hospital	F-8	27. Yonkers Racway	F-8	37. Yonkers Racway	C-12	7C. Colonial Terrace G. C.	N-10	114. Hackensack G. C.	H-8	118. Mt. Labor G. C.
N-0	145. Sarah Lawrence College	B-12	47. Trinity Church & Old Graveyard	F-10	10. Union Co. Court House	C-7	7D. Deal G. & C. C.	D-4	2N. Hampshire G. C.	D-13	2N. North Hills G. C.
D-10	155. Schenck Crooks House	H-11		C-7				N-10	3N. Hendricks Field G. C.	E-4	2N. North Jersey C. C.

GOLF CLUBS



For Continuation of Routes See Reverse Side.

1-5	125	St. Peter's College	F-9	27A	Triborough Stadium	E-11	27	Yonkers Hospital	B-12	3C	Colonia C.C.	N-10	7B	Green Pond G.C.	10M	Mountain Ridge G.C.
G-9	135	St. Vincent's Hospital	G-9	37	Trinity Cathedral	F-10	37	Yonkers Raceway	B-12	3C	Colonial Terrace G.C.	N-10	11M	Hackensack G.C.	11M	St. Ybar G.C.
N-0	145	Sarah Lawrence College	B-12	47	Trinity Church & Old Graveyard	F-11	47	Union Co. Court House	F-11	3C	Crestmont	N-10	24	Hampshire G.C.	24	North Hills G.C.
O-10	155	Schenck Crooke House	N-11	11U	Union Co. Court House	G-7	11U		G-7	1D	Deal G.C. & C.	P-10	24	Hampshire G.C.	24	North Jersey C.C.

GOLF CLUBS



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
EDISON, NEW JERSEY 08817

RECEIVED

OCT 17 1979

October 15, 1979

E. Response
and Inspection Branch
Edison, N. J.

Dr. Sidney Grey
Office of the Commissioner
New Jersey Department of Environmental Protection
P.O. Box 1390
Trenton, NJ 08625

Dear Dr. Grey:

As we agreed in our recent meeting in Trenton, I am sending you names of a few people I consider knowledgeable regarding dredging of pollutant laden sediments. Providing an environmental impact assessment of such dredging is not a simple matter, as you are well aware; it requires consideration by experts in several disciplines. The persons I am recommending, with the exception of Dr. Engler, have all served on the PCB committee to clean up the Hudson River. They are not only well versed in the theoretical aspects, but are equally at home in the practical areas. I suggest that you telephone each one, and arrange individual meetings, or a group meeting, to review the dredging proposal. The matter of consulting fees you can discuss with each one.

Following are my recommendations:

(1) Dr. John Sanders
Professor of Geology
Barnard College
New York, NY 10027
212-280-4312

Specialty
Geological problems,
sediments, etc.

(2) Mr. Joseph Stellato
N.Y.S. Dept. of Transportation
Waterways Maintenance Submission
Building No. 5, Room 216
State Campus
Albany, NY 12232
518-457-4420

Dredging techniques

(3) Mr. Dennis Suskowski or
Mr. John Zammit
U.S. Army Corps. of Engineers
New York District
26 Federal Plaza
New York, NY 10007
212-264-9020

Dredging

(4) Dr. Dominick Pirone
Professor of Biology
Manhattan College
4513 Manhattan College Parkway
Bronx, NY 10471
212-549-8000, Ext. 245, 246

Biological studies,
ecology

(5) Dr. Robt. M. Engler
P.O. Box 631
Waterways Expt. Station
Environmental Labs
Vicksburg, Miss. 39180
601-636-3111

Geochemistry, soils

I have discussed your problem only with Dr. Sanders and Mr. Stellato. Dr. Sanders informed me that he is serving on the Governor's Hackensack Meadowlands Committee, one of whose objectives is to make an environmental assessment of dredging such as you are seeking to make. He also reminded me of the workshop (October 13th) to develop environmental information on mercury in the Meadowlands.

I am acquainted with Dr. Engler only through telephone conversations relating to soils and landfills. He is not a member of the PCB committee.

If you desire to discuss any aspect of the above information further, please call me on 201-321-6782.

Sincerely yours,



Robert W. Mason

copies to: Polito
Sanders
Stellato
Suskowski, Zammit
Pirone
Engler
Metzger
Rubel

October 15, 1979

Mr. David Lipsky
Office of the Commissioner
New Jersey Department of
Environmental Protection
P. O. Box 1390
Trenton, New Jersey 08625

Dear Dave,

Attached is a copy of U. S. Coast Guard Commandant Notice 7302, dated December 1, 1979, dealing with guidance in the use of the 311(k) revolving fund in dealing with hazardous waste dump sites.

This guidance should be used in conjunction with 33 CFR, Part 153 and 40 CFR 1510, particularly Annex IX, paragraph 1905.2.

I would suggest that in exploring funding through this route, you contact Karl Birns for guidance and coordination in exploring and evaluating the appropriateness of this funding. Karl may wish to discuss this with Fred Rubel, Chief, Emergency Response & Inspection Branch.

Also attached are three "Selected Water Resources Abstracts" dealing with the removal of mercury from stream bottoms. These are entitled as follows and are alternatives to dredging:

- (1) Mercury Getters in Mercury Pollution Control in Streams and Sediments
- (2) Polymer Film Overlay System for Mercury Contaminated Sludges
- (3) Waste Wool as a Scavenger for Mercury Pollution in Waters

Our library has a number of documents dealing with mercury. It may be worthwhile to have someone go through them for appropriateness

to your problem. With my work load, I simply do not have time to meet your court mandated timetable to do this all myself.

I also spoke to Peter Anderson concerning your statements about ocean dumping of dredged sediments. In order to clarify any misconceptions you may have, please contact him directly. His phone number is 201-321-6757.

Sincerely yours,

Michael V. Polito
Emergency Response & Inspection Branch

Attachments

cc: B. Metzger
F. Rubel